(15)

No. 92-551-CFX
Status: GRANTED

Title: Henry G. Cisneros, Secretary of Housing and Urban Development, et al. Petitioners
v.
Alpine Ridge Group, et al.

Docketed:
September 25, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Daheim,Warren J., Coverdale,John

081892 ext til 092692 by O'Connor, J.-CITED

Entry	Date	Note	Proceedings and Orders
1	Aug 14 1992	G	Application (A92-135) to extend the time to file a petition for a writ of certiorari from August 27, 1992 to September 26, 1992, submitted to Justice O'Connor.
2	Aug 18 1992		Application (A92-135) granted by Justice O'Connor extending the time to file until September 26, 1992.
3	Sep 25 1992	G	Petition for writ of certiorari filed.
4	Oct 23 1992		Brief of respondents Acacia Villa, et al. in opposition filed.
5	Oct 26 1992		Brief of respondents Alpine Ridge Group in opposition filed.
7	Oct 26 1992		Brief amici curiae of National Leased Housing Association, et al. filed.
6	Oct 28 1992		DISTRIBUTED. November 13, 1992
8	Nov 2 1992		Reply brief of petitioners filed.
9	Nov 16 1992		Petition GRANTED.
			**********
11	Dec 21 1992		Order extending time to file brief of petitioner on the merits until January 7, 1993.
12	Jan 4 1993		Record filed.
		*	Certified proceedings United States District Court, Western District of Washington (BOX)
13	Jan 5 1993		Record filed.
		*	Certified proceedings United States District Court, Central District of California (BOX)
14	Jan 7 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
15	Jan 7 1993	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
16	Jan 7 1993		Brief of petitioners Kemp, Secretary of HUD,et al. filed.
17	Jan 7 1993		Joint appendix filed.
18	Jan 7 1993		LODGING consisting of 18 copies of July 1990 HUD Report submitted by the Solicitor General.
20	Feb 5 1993		Brief amicus curiae of Charter Federal Savings Bank filed.
21	Feb 5 1993		LODGING consisting of seven documents submitted by respondent Alpine Ridge Group.
22	Feb 8 1993		Brief of respondents Acacia Villa, et al. filed.
23	Feb 8 1993		Brief of respondent Alpine Ridge Group filed.
24	Feb 8 1993		Brief amici curiae of Statesman Savings Holding Corp., et

No. 92-551-CFX

Entry	Date	Note	Proceedings and Orders
			al. filed.
25	Feb 8 1993		Brief amici curiae of Southwind Acres Associates, et al. filed.
26	Feb 8 1993		Brief amici curiae of National Association of Home Builders, et al. filed.
27	Feb 12 1993		CIRCULATED.
28	Feb 22 1993		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
19	Mar 3 1993		SET FOR ARGUMENT TUESDAY, MARCH 30, 1993. (2ND CASE).
29	Mar 11 1993	X	Reply brief of petitioners filed.
30	Mar 12 1993		LODGING consisting of twelve copies of the 1978 HUD Task Force paper submitted by the Solicitor General
31	Mar 30 1993		ARGUED.

92-551

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating vested contract rights.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: the United States Department of Housing and Urban Development; the United States; Monroe Associates, a Limited Partnership; Brentwood, a Limited Partnership; Campbell Courts Associates, a Partnership; Cheney Gardens Limited Partnership, a Limited Partnership; Bitterroot Manor, a Limited Partnership; Crown Plaza Associates, a Limited Partnership; Crestwood Inn, Inc.; Dakota Meadows Associated, a Limited Partnership; Douglas Grove, a Limited Partnership; Golden Valley Homes Associates, a Partnership; Gary D. Erickson; Bothell Landing Associates, a Partnership; Howard O. Wilson and Donita E. Wilson; Moses Lake Estates, a Limited Partnership; Howard Street Association, a Limited Partnership; Magnuson Group, a Joint Venture; Marion Court Associates, a Partnership; Meadowood Development Co., LTD.; Rainier Vista Associates, a Limited Partnership; Rawlins & Rex, a Partnership; Gordon Henrickson; Olympic Village, LTD., a Limited Partnership; Robert & Ingrid Becker, husband and wife; Park West Associates, a Limited Partnership; Sound View Associates, a Partnership; South Bayview Associates, a Partnership; Sundowner Associates, a Limited Partnership; Wapato Gardens, a Limited Partnership; Westwood Associated, a Partnership; Willapa Landing Associates, a Limited Partnership; Axelrod Marymoor Associates, a Limited Partnership; Security Rental Properties, a Partnership; Park West Associates, a Limited Partnership; Riverwood Manor Associates, a Partnership; Wright Park Associates, a Limited Partnership; Yakima Gardens, a Limited Partnership; Michael and Patti Carpinito,

husband and wife; Dan and Carol Carpinito, husband and wife; Vista Lee Rosa Co., a Partnership; Terra Bella Development Co., a Partnership; Goldsborough Creek Associates, a Limited Partnership; Craigmont Associates, a Limited Partnership; Fernhill Terrace Associates, a General Partnership; Meriwether Village, a General Partnership; COHO Park, a General Partnership; Lacey Housing, Inc., a General Partnership; Marvin L. Koh, Audrey S. Koh, Barbara E. Koh, Christopher C. Koh and David A. Koh; Narrows Apartments Associates; Hotel Oakland Associates, a Limited Partnership; Emeric Goodman Associates, a Limited Partnership; Acacia Villa; Alicia Park Apartments; Amerige Villa; and Antelope Valley.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Jack F. Kemp, Secretary of the United States Department of Housing and Urban Development, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-14a, is reported at 955 F.2d 1382. The opinion of the district court in the *Alpine Ridge* case, App., *infra*, 15a-30a, is reported at 764 F. Supp. 1393; a supplemental order in that case, App., *infra*, 32a-39a, is unreported. The opinion of the district court in the *Acacia Village* case, App., *infra*, 40a-60a, is reported

at 774 F. Supp. 1240; the final judgment in that case, App., *infra*, 61a-63a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 29, 1992. App., *infra*, 64a-66a. On August 18, 1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 (codified at 42 U.S.C. 1437f (c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f(c) note (Supp. II 1990)), is set forth in an appendix. App., *infra*, 67a-71a.

STATEMENT

In this case, the court of appeals declared an Act of Congress unconstitutional. The court held that Section 801 of the Department of Housing and Urban Development Reform Act of 1989 abrogates contracts between the government and private parties and therefore violates the Due Process Clause of the Fifth Amendment.

1. *Background.* In 1974, Congress added the Section 8 program to the Housing Act of 1937 (Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to millions of low income tenants by authorizing the payment of rent subsidies. The tenant's rental obligation is based on his ability to pay, while the federal government makes "assist-

ance payments" to the project owner to bring total rental income up to the prevailing market level. See generally 42 U.S.C. 1437a(a), 1437f(b) and (c).

Under the Section 8 program, the Secretary of the United States Department of Housing and Urban Development (HUD) enters into standard form long-term contracts with project developers and landlords. These are known as "housing assistance payment contracts" or HAP contracts. The framework for those contracts is governed by statute. Under the statute, a maximum monthly rent is established for each dwelling unit, which (subject to exceptions not relevant here) cannot exceed a "fair market rental[]." 42 U.S.C. 1437f(c)(1). The statute, as originally enacted, also provided for adjustments in the maximum monthly rent in accordance with the following provisions:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.
>
> * * * * *
>
> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

42 U.S.C. 1437f(c)(2)(A) and (C) (1982).[1] The HAP contracts implement those provisions by (1)

[1] In 1988, Congress amended Section 8(c)(2) of the Act, *inter alia*, by deleting the phrase "assisted units and compar-

providing that adjustment of rents will be made on the basis of a reasonable formula, and (2) stipulating as an "overall limitation" that, notwithstanding any other provision of the contract, adjustments shall not produce material differences between the rents at comparable assisted and unassisted units.

As to the formula-based adjustment, the HAP contract states:

> b. *Automatic Annual Adjustments*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register * * *.
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

HAP Contract, § 1.9b.[2] The Automatic Annual Adjustment Factors (Adjustment Factors) are generated by HUD's Office of Economic Affairs, which uses the Consumer Price Index and the Bureau of the Census American Housing Surveys to produce a percentage by which the rent will be adjusted. HUD establishes different Adjustment Factors to cover broad regions of the country. See, *e.g.*, 52 Fed. Reg. 9478-9491 (1987) (Adjustment Factors established for four census regions, Alaska and Hawaii, and 72 metropolitan areas).

As to the cap on the formula-based adjustments (required by 49 U.S.C. 1437f(c)(2)(C)), the HAP contract states:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government. * * *

HAP Contract, § 1.9d. HUD regulations also reflect the Secretary's determination to make adjustments in rents based on the Adjustment Factors, subject to an overall cap that adjustments shall not produce a material difference from rents at comparable unassisted units, as determined by HUD. See 24 C.F.R. 880.609(c).

2. *The* Rainier View *decision.* In the early 1980s, HUD became concerned that application of the Adjustment Factors was yielding rents in some instances

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able unassisted units" and replacing it with the phrase "assisted and unassisted units of similar quality and age in the same market area." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(A), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C).

[2] The relevant provisions of the HAP contract are quoted in *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988, 989-990 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989). Some HAP contracts contain identical language with different section numbers. More recent HAP contracts provide that, on the owner's request, contract rents will be adjusted in accordance with pertinent HUD regulations. See HUD Form 52522D (8-80). These differences are not material for purposes of this petition.

that were unduly high in comparison with comparable unassisted units. Accordingly, to comply with the statutory directive to avoid excessive rents and in conformity with the overall limitation provision of the HAP contracts, HUD began to undertake, with respect to individual projects, "comparability studies" as a means of determining the rents charged in comparable unassisted units. Those studies would identify three to five comparable projects in a relevant geographic area and would then conduct appraisals to see whether the rents at those projects were materially different from those at the Section 8 project. If the differences were material, the rents determined through the comparability studies would serve as a "cap" to the rental increase produced by the more general Adjustment Factors.

HUD's determination to use comparability studies as a cap to increases produced under the Adjustment Factors led to litigation. In particular, Section 8 project owners challenged HUD's use of comparability studies to limit increases under the Adjustment Factors, claiming that their contracts entitled them to the full increases produced by the Adjustment Factors. In *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989), the court of appeals rejected HUD's interpretation of the law as well as the plain language of the contracts, and concluded that HUD could not use comparability studies to limit formula-based rent increases.

The *Rainier View* court stated that Section 8(c)(2)(A) allows HUD to choose *either* the market-survey *or* the reasonable-formula method for adjusting rents, and that "[t]he overall limitation provi-

sion * * * is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. The court found that HUD, having elected to use a reasonable formula in the HAP contracts, could not go back on that choice by applying a market survey cap through the comparability studies. In the court's view, that approach would nullify the formula method that the statute authorizes and that HUD elected. The court also believed that HUD's regulations took the view that the "overall limitation" had to be integrated into the adjustment formula, not superimposed on top of it. *Ibid.*

Shortly before the panel ruled in *Rainier View*, Congress amended Section 8 in a manner that confirmed the permissibility of HUD's use of comparability studies to cap Adjustment Factor increases.[3] Although the court of appeals was advised of that amendment, it denied rehearing. This Court denied the government's petition for a writ of certiorari. 490 U.S. 1066 (1989).

3. *The statute at issue in this case.* Following *Rainier View*, disputes continued to arise regarding the use of comparability studies. In December 1989, Congress enacted the provision at issue in this case with the goal of putting an end to the continued

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[3] It did so by adding to Section 8(c)(2)(C) the following sentence: "If the Secretary * * * does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988).

controversy.[4] The Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 801, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f(c) note (Supp. II 1990)), prescribes new procedures for calculating rent adjustments, both retrospectively and prospectively.

As to rental increases from 1980 until the date when HUD promulgates new regulations,[5] Section 801(a), 103 Stat. 2057-2058, provides for retrospective rental increases higher than those HUD would have permitted under its comparability limitation, but lower than those called for by the full formula adjustment standing alone; this was designed to correct what Congress perceived to be HUD's maladministration of comparability studies in the past. Section 801(a) calls for HUD to adjust rents by applying the Adjustment Factors to the portion of the contract

[4] The Senate Banking, Housing, and Urban Affairs Committee explained that "[t]he Committee did not * * * share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies. Clearly, a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). Accordingly, as one of the sponsors stated, the new bill sought to "ensure a reasonable rate of return to the owners while effectuating the original congressional objective * * * of avoiding excessive rents and rates of return for section 8 projects"; the amendment was meant to "resolve past and present controversies between [HUD] and project owners," as well as "eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." *Id.* at S16,608-S16,609 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato).

[5] Such regulations have now been promulgated. 56 Fed. Reg. 59,996 (1991).

rent other than that used for debt service, or by multiplying the contract rent by 30% of the Adjustment Factors, whichever yields the higher payment to the owner.[6]

For the future, Section 801(c) requires HUD to promulgate "regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments * * * would result in such material differences" between assisted and unassisted units and to use those studies to establish a modified annual adjustment factor. 103 Stat. 2058. The statute describes the methodology to be used by the Secretary in conducting comparability studies. It also stipulates that if a modified adjustment factor cannot be established or fails to eliminate material differences between rents at similar assisted and unassisted units, the Secretary may apply another methodology to achieve that end. *Ibid.*

Finally, Section 801(d) provides that, at a project owner's request, HUD will make a one-time determination of the contract rent as a basis for future rent adjustments. 103 Stat. 2058-2059. Under that provision, the contract rent will be the greater of (a) the currently approved contract rent, or (b) the contract rent as calculated under the retroactive provisions in Section 801(a).

4. *The present controversy.* Respondents are developers and owners of Section 8 projects. They brought challenges to the constitutionality of Section 801, contending that their HAP contracts, as con-

[6] Section 801(a) was expressly made inapplicable to projects covered by a prior final judgment in litigation over the authority of the Secretary to use comparability studies to limit rental adjustments. § 801(a)(2)(B), 103 Stat. 2058.

strued in *Rainier View*, entitled them to rent increases in accordance with the Adjustment Factors and that Section 801's alteration of those contracts violates the Due Process Clause of the Fifth Amendment. The United States District Courts for the Western District of Washington and the Central District of California, in separate cases, declared Section 801 unconstitutional, App., *infra*, 15a-31a, 40a-63a, and the government appealed.

The court of appeals consolidated the two cases and affirmed. App., *infra*, 1a-14a. The court first held that it was bound by *Rainier View*'s ruling that comparability studies could not be used under the HAP contracts to limit rent increases under the Adjustment Factors, notwithstanding the fact that amendments to the Section 8 program revealed that Congress had intended comparability studies to serve as a cap to such rent increases. App., *infra*, 6a-8a.

The court then determined that the owners' contractual rights to rent increases under the Adjustment Factors were "vested" property rights. App., *infra*, 8a-12a. The court relied on the conclusion of the *Rainier View* court that "HUD *explicitly* limited its statutory options by choosing the formula methodology for adjusting rents and bound itself to that choice in the contracts with the owners." *Id.* at 12a. The court did not independently defend the *Rainier View* court's reading of the "overall limitation" provision.

Finally, relying on *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), the court of appeals found that Section 801 unconstitutionally modifies respondents' vested property rights because Congress, as the court saw it, had acted solely in order to save money payable by the government under the HAP contracts. App., *infra*, 12a-14a. The court rejected the contention that Section 801 clarified that respondents are wrong in claiming entitlement to rent increases based on the Adjustment Factors free from the "overall limitation" cap. It also dismissed out of hand the argument that Section 801 is constitutionally valid as a measure designed to resolve the continued dispute over the proper method for adjusting rent increases in the Section 8 program. The court therefore concluded that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment." App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has struck down Section 801 of the Department of Housing and Urban Development Reform Act of 1989 on the ground that it abrogates vested contract rights protected by the Due Process Clause. The decision invalidates a key provision in a substantial federal program designed to provide housing for low-income tenants. If allowed to stand, the decision will require HUD to pay many millions of dollars in extra federal subsidies to Section 8 project owners. Because the court's decision rests on a deeply flawed construction of the HAP contracts, misapplies this Court's due process jurisprudence, and threatens to inflict widespread harm on a major social welfare program, this Court's review is warranted.

1. The Ninth Circuit concluded that Section 801 impairs respondents' "vested" property rights in their HAP contracts. That analysis began with the assumption, derived from that court's decision in *Rainier View*, that the HAP contracts guarantee Section 8 project owners the unqualified right to rent increases as computed under the Adjustment Factors. The court then found that Section 801's

modification of that "right" substantially impairs respondents' property. The Due Process Clause of the Fifth Amendment protects against deprivations of "life, liberty, or property without due process of law," U.S. Const. Amend. V, and contractual rights may constitute property rights. But Section 801 does not *impair* respondents' contract rights unless *Rainier View*'s reading of those contracts is correct. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). "If the claimed right cannot be found in the contract, [respondents] would have no property right on which to base standing to attack the constitutionality of section 801." *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 687 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.).

The threshold question is therefore whether *Rainier View*'s interpretation of the HAP contracts is correct. If the Ninth Circuit erred in its contractual holding, its constitutional analysis was unnecessary. Cf. *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407, 1414 (1992). For several reasons, *Rainier View*'s holding is untenable.[7]

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[7] The three courts outside of the Ninth Circuit that have considered constitutional attacks against Section 801 have each concluded that *Rainier View* is wrong. Those courts have found that project owners do *not* have a right to the full formula adjustment regardless of the result of a comparability study. Accordingly, those courts have held Section 801 has not deprived landlords of constitutionally protected contract rights. *Carmichaels Arbors Assocs.* v. *United States*, *supra*; *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).

a. The unequivocal language of the HAP contracts establishes that Section 8 project owners have no right to rent increases under the Adjustment-Factors formula when that formula will produce rents that exceed rents at comparable unassisted projects. Section 1.9b of the HAP contract states that HUD will publish annual adjustment factors, and will apply them to contract rents. Section 1.9d, however, subjects that procedure to what is explicitly termed an "*overall limitation*"—"Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *." That language clearly states that the requirement of avoiding material differences takes precedence over all other contractual provisions: it is an "overall limitation."

To enforce the mandate of Section 1.9d, HUD determined to conduct targeted "comparability studies." The Adjustment Factors, while adjusting rents by a presumptively reasonable amount, cannot assure that in each specific case the formula-based rent increases will not result in material differences between assisted and comparable unassisted units. Accordingly, when it suspected that the Adjustment-Factor increases might be excessive, HUD appraised rents at three to five comparable projects in a relevant geographic area. If that effort revealed no material differences between the assisted and unassisted projects, HUD applied the Adjustment Factors to adjust rents; if, however, material differences were discovered, HUD limited the rent increases so that they did not materially exceed rents at comparable unassisted proj-

ects. That procedure is clearly authorized by the "overall limitation" provision of the HAP contract.

The HAP contract must be construed in light of the Housing Act of 1937, for HUD had no authority to enter into agreements that were not authorized by the statute. *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). The statute requires the Secretary to ensure comparability; it lends no support to the position that the Adjustment Factors can be mechanically applied when to do so would yield excessive rents.[8] If the Secretary *had* entered into contracts that allowed that result, those contracts would have been beyond his authority.

Because the statute gives the Secretary discretion about *how* to fulfill the requirement that material differences be avoided, the Secretary has the authority to adopt reasonable interpretations of that requirement. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). And because the HAP contract incorporates the statutory requirement that material differences between assisted and comparable unassisted projects be avoided, the construction of the contract is informed by the

[8] The Act states that contracts in the Section 8 program shall provide for rental adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A). It adds the caveat, however, that rental adjustments "shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality and age in the same market area, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C).

Secretary's interpretation of the statute.[9] Not only is the Secretary's interpretation in this case reasonable and consistent with the statute, it was ratified by Congress's action in Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988). See note 3, *supra*. A statutory amendment authorizing continuation of the agency's approach is "virtually conclusive" in interpreting the statutory scheme. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91-92 (1958).

b. The *Rainier View* court concluded that HUD is prohibited from using comparability studies as an independent cap on the Adjustment Factors. The court stated that if the comparability studies reveal that the Adjustment Factors are inaccurate in an individual case, HUD is limited to revising the formulas that produce the Adjustment Factors. 848 F.2d at 991. That holding misinterprets the "overall limitation" provision of the HAP contract and frustrates the Act's requirement of prevailing market-level rents.

The premise of *Rainier View* is that Section 8 (c)(2)(A) requires HUD to adjust rents based on *either* a market survey method *or* a formula method, and that having elected to use the formula method, HUD could not conduct comparability studies without "nullifying" that election. The comparability studies, however, are not equivalent to the "fair market

[9] See *Central Elec. Coop., Inc.* v. *Bonneville Power Admin.*, 835 F.2d 199, 203-204 (9th Cir. 1987); *Beck Park Apartments* v. *United States Dep't of Housing & Urban Dev.*, 695 F.2d 366, 370 (9th Cir. 1982).

rental[]" method described in Section 8(c)(2)(A). The "fair market rental[]" method refers to the process for producing Fair Market Rents (FMRs) which reflect the results of surveys of rents in a large number of units in a broad geographic area. See 24 C.F.R. 888.103; 53 Fed. Reg. 14,954 (1988). The FMRs are required to establish the original contract rent. 42 U.S.C. 1437f(c)(1). The comparability studies, in contrast to the FMRs, focus on particular projects and consider a small number of comparable units; they do not establish a rent level for a general area. HUD's limited use of comparability studies therefore does not represent a switch to the "fair market rental[]" method.

While HUD's reading does not nullify a provision of the statute, the Ninth Circuit's reading does exactly that. Section 8(c)(2)(C) *required* HUD to prevent rental adjustments that produce material disparities between comparable assisted and unassisted units. Under the Ninth Circuit's approach, HUD was powerless to prevent such disparities unless it modified the adjustment formula itself. That approach nullifies the statute's authorization for the Secretary to take action when the Adjustment Factors, although working as a general matter, are producing anomalous results in a particular case.

The only other support that the *Rainier View* court found for its interpretation was a HUD regulation, 24 C.F.R. 888.204, that discusses interim revisions of the Adjustment Factors. 848 F.2d at 991. On its face, however, that regulation addresses the situation when the Adjustment Factors may be producing too *low* an adjustment, not when the Adjustment Factors may be producing too *high* an adjustment. In fact,

that regulation implements Section 8(c)(2)(A), not Section 8(c)(2)(C). Another regulation, 24 C.F.R. 880.609(c)—which the court did not cite—fully supports HUD's use of comparability studies.[10] HUD's interpretation of its own regulations is entitled to great deference. See *Martin* v. *Occupation Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175-1176 (1990); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). The court, however, gave it none.

In sum, the *Rainier View* court erred in finding that respondents have vested contract rights to formula-based rent increases without limitation through comparability studies. Accordingly, respondents lack the property right that the court of appeals found was infringed by Section 801.

2. Even if the HAP contracts did bear the meaning given them in *Rainier View*, the court of appeals' substantive due process holding—that Section 801 unconstitutionally impairs vested contract rights—is wrong.

a. When Congress enacts economic regulation that affects property rights, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*,

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[10] That regulation states, in pertinent part:

> *Overall limitation.* Any adjustment of contract rents for a unit after Contract execution * * * must not result in material differences between the rents charged for assisted units and comparable unassisted units * * *.

The regulation reflects HUD's consistent view that Section 8(c)(2)(C) establishes an overall limitation on rents. See 40 Fed. Reg. 18,687 (1975) (promulgating former 24 C.F.R. 880.110(d)); 44 Fed. Reg. 59,428 (1979) (repromulgation of rule as 24 C.F.R. 880.609(c)).

428 U.S. 1, 15 (1976). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978). The same rationality test applies to the retroactive aspects of economic legislation. *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 728-731 (1984). As this Court reaffirmed just last Term, it does not violate due process for a legislature to respond to the "unexpected results" of a judicial decision by restoring the legal regime that had previously been understood to prevail. *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992).

This Court and others have upheld against due process challenges such "curative" legislation designed to respond to a judicial decision. *Romein*, *supra*; *Opdyke Investment Co.* v. *Detroit*, 883 F.2d 1265, 1274-1276 (6th Cir. 1989); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). The Court has reached that result even when the legislation extinguishes claims against the government. In *Graham and Foster* v. *Goodcell*, 282 U.S. 409 (1931), the Court approved a "curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." *Id.* at 429. The Court in that case upheld a curative tax statute that cut off a "vested" refund claim, explaining that "[w]here the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist." *Ibid.*

Similarly, Section 801 is a valid instance of "curative" legislation. It is rationally designed to restore a proper basis for adjusting rents in the Section 8 program after that basis was upset by the unexpected decision in *Rainier View*. See note 4, *supra*. The Section 8 landlords long knew of HUD's position that comparability studies were permissible, and were well aware from the Housing and Community Development Act of 1987 that Congress shared that view. In addition, the Section 8 landlords can assert no equities against modification of a contract that, as interpreted by the Ninth Circuit, gives them the right to *above*-market rents; they knowingly entered into a program that was designed simply to provide prevailing market rents. See S. Rep. No. 693, 93d Cong., 2d Sess. 45-46 (1974).

That Congress acted permissibly in enacting Section 801 is further supported by the principle that "sovereign power * * * is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52 (1986), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Accordingly, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *POSSE*, 477 U.S. at 52, quoting *Merrion*, 455 U.S. at 147.

Congress did not unmistakably surrender its authority to legislate in ways that affect its contractual arrangements with Section 8 project owners. Rather, Section 8 owners, like participants in other federally subsidized housing programs, were well aware that the program was subject to congressional oversight

and action. As this Court has observed about a similar federal housing program, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958). Section 801 legitimately clarifies the Section 8 program in order to implement its original goals.[11]

b. In striking down Section 801, the court of appeals relied on this Court's decisions in *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). The court concluded that those decisions prevent Congress from changing contractual obligations of the government "solely to save money." App., *infra*, 14a. The narrow principle established on the distinctive facts of *Lynch* and *Perry* is not applicable here.

In *Lynch*, the Court struck down a law that abrogated the government's obligation to pay benefits on "War Risk" life insurance policies issued during

[11] Even on the Ninth Circuit's reading of the HAP contracts, it is difficult to understand why respondents' "substantial rights" are infringed by Section 801. *The Darlington, Inc.*, 358 U.S. at 91. As the *Rainier View* court saw it, HUD was not barred from using comparability studies altogether, but was limited to using them in making an "adjustment of the [Adjustment Factors]." 848 F.2d at 991. Because such an adjustment could presumably have produced the same financial result for Section 8 landlords as the approach HUD adopted, Section 801 did not alter any substantive right to be free of comparability studies, but simply changed a procedural right governing their use. Such a procedural right should not be held to "rise to the level of 'property,'" *POSSE*, 477 U.S. at 55, such that it is immune from reasonable legislative change.

World War I for which premiums had already been paid. The Court noted that the law in question was "popularly known as the Economy Act," and concluded that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States" on such paid-up insurance policies. 292 U.S. at 580. In *Perry*, the Court held that Congress cannot invalidate the terms of debt obligations the government incurs "on the credit of the United States." 294 U.S. at 350-351. The Court concluded that the constitutional power to borrow money entails the power to make a binding promise that a subsequent Congress cannot "alter" or "destroy." *Id.* at 353-354.

This case is different from *Lynch* and *Perry*. Section 801 does not repudiate a legislatively promised benefit for which private parties paid consideration, as in *Lynch*, nor does it disavow a federal debt obligation undertaken under the constitutional grant of power to borrow money, as in *Perry*. Compare *POSSE*, 477 U.S. at 55. Section 801 adjusts the payment provisions in a comprehensively regulated low-income housing program to ensure that the developers do not reap non-market justified gains. It restores what Congress has always made clear is the basis of the program—prevailing market rents—and fine tunes the methodology for achieving the program's ends. The Ninth Circuit erred in extending *Lynch* and *Perry* to this very different context.

Moreover, the Ninth Circuit erred in concluding that Section 801 was enacted "solely to save money." App., *infra*, 13a. When Congress acted, the dispute between HUD and Section 8 landlords over the use of comparability studies had been litigated in only

one circuit, and Congress disagreed with the holding of *Rainier View*. Nevertheless, one of the central purposes of Section 801 was to put an end to further litigation over the proper construction of the HAP contracts and to establish a proper basis for future rent adjustments. Continued litigation threatened to impede attainment of Section 8's goals, both by diverting administrative resources and by creating a climate of uncertainty for participants. In order to reinstate the program's market-rent premise, and to correct flaws in HUD's use of comparability studies, Congress enacted Section 801. See 135 Cong. Rec. S16,609 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato); *id.* at S16,594 (remarks of Sen. Cranston). To be sure, some legislators noted that Section 801 would save the government money that would otherwise be due if *Rainier View* were the final word. See, *e.g.*, 135 Cong. Rec. H9,686 (daily ed. Nov. 21, 1989) (remarks of Rep. Gonzalez); *id.* at S16,607 (remarks of Sen. Sasser). But those statements do not take away from the fact that Section 801 is designed to protect Congress's low-income housing initiative, and has a more complex purpose than simply to reduce government expenditures.

3. The ruling of the court of appeals deserves this Court's review. In the nearly 60 years since *Perry*, no decision of this Court has struck down an Act of Congress on the theory that it abrogated vested property rights in contracts with the government. The court of appeals' conclusion that this case merited such strong medicine deserves this Court's attention.

In addition, the decision of the court of appeals is of great programmatic importance. The Section 8 project-based program is one of the largest housing programs administered by HUD, with a total of over

$100 billion in projected federal subsidies due to project owners. Over 15,000 contracts are in effect nationwide, and all are governed by the statutory provisions and contractual procedures that the Ninth Circuit considered in this case. HUD estimates that the Ninth Circuit's ruling will cost the government approximately $50 million and that, if the decision is applied nationwide, the cost to the Section 8 program will exceed $1 billion. Because of its financial significance, the issue is being litigated in other circuits, and HUD has prevailed in two districts courts and the Claims Court. See note 7, *supra*. Absent this Court's intervention, such litigation will continue.

The significance of this issue is highlighted by the fact that Congress has revisited the Act on two occasions to indicate the appropriateness of comparability studies while placing limitations on their application and use. Section 801 represents Congress's most recent effort to grapple with this issue and to establish an administrative mechanism under which Section 8 rents may be fairly adjusted each year. Under the court of appeals' ruling, however, Congress has lost a large component of its freedom to act in this field.

CONCLUSION

The petition for a writ of certiorari should be granted.

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SEPTEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-35267

D.C. No. CV-89-01654-BJR

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

and

BITTERROOT MANOR, a limited partnership, ET AL., PLAINTIFFS-INTERVENORS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

No. 91-35573

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

No. 91-55354

D.C. No. CV-90-0390-MRP

ACACIA VILLA; ALICIA PARK APARTMENTS; AMERIGE VILLA; ANTELOPE VALLEY, ET AL., PLAINTIFFS-APPELLEES

v.

JACK KEMP, Sec. HUD; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

OPINION

Argued and Submitted
October 11, 1991—Seattle, Washington

Filed February 7, 1992

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Opinion by Chief Judge Wallace

OPINION

WALLACE, Chief Judge:

The Secretary of the Department of Housing and Urban Development (HUD) appeals from decisions of two district courts, each of which entered a summary or partial summary judgment; one to the Alpine Ridge Group (Alpine) and one to Acacia Villa (Acacia), holding an act of Congress unconstitutional. The district courts had jurisdiction under 28 U.S.C. §§ 1331 and 1361. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Alpine and Acacia (owners) are developers and owners of housing projects covered by section 8 of the United States Housing Act of 1937, as amended, 42

U.S.C. § 1437f (Housing Act). Pursuant to the authority granted by Congress in section 8, HUD solicited private developers to submit construction bids for low-income rental housing. HUD or its local designate awarded selected developers Housing Assistance Payment contracts. Under the contracts, the developer/owner collects a portion of the rent from the tenant, based on the tenant's income, while the remainder is paid by the United States as a subsidy. Section 8 also requires HUD to include a provision in the contracts with owners permitting at least annual rent adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A).

The owners brought suit against HUD claiming entitlement to yearly "formula" rent increases, basing their claim primarily upon the interpretations of section 8(c)(2)(A) of the Housing Act and section 1.9(b) of the contracts adopted in *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988) (*Rainier View*), *cert. denied*, 490 U.S. 1066 (1989). *Rainier View* held that HUD elected to use the "reasonable formula," rather than the "fair market value," method for determining annual rent adjustments in section 8 contracts. *Id.* at 991. The formula method obliges the government to calculate and publish Automatic Annual Adjustment Factors (factors), which are then used to adjust contract rents. Our court reasoned that because HUD elected the formula method, it could employ "fair market" comparability studies only to the extent that it incorporated those studies into the factors used to calculate the formula rent adjustments. *Id. Rainier View* rejected HUD's argument that an "Overall Limitation" provision in the contracts permitted HUD to use market rates to cap rent adjustments under the formula method to prevent "material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government. . . ." *Id.* at 990-91.

Despite our decision in *Rainier View*, HUD has continued to adjust rents, not according to the formula method, but on the basis of market comparability studies. HUD has done this in reliance on the Overall Limitation provision and subsequent congressional amendments to section 8 which adopted HUD's interpretation of the Overall Limitation clause. In 1989, Congress enacted section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, 2057 (HUD Reform Act), ostensibly to change the result in *Rainier View* and settle the dispute between HUD and section 8 owners regarding the method for calculating annual rent adjustments. Section 801 prescribes one new procedure for computing past rent adjustments, and a different procedure for future adjustments. Under these new methods, owners receive a rent increase that is smaller than, but not less than thirty percent of, the rent adjustments they would have been entitled to under the original formula method.

Both district courts held that the HUD Reform Act violated the fifth amendment due process clause by impairing the owners' vested rights to annual rent adjustments pursuant to their section 8 contracts. The cases were consolidated for purposes of appeal.

II

The constitutionality of a statute is a question of law and, therefore, we review the district courts' ruling de novo. *Trerice v. Pedersen*, 769 F.2d 1398, 1400 (9th Cir. 1985). In order to assert a due process claim under the fifth amendment, the owners must first establish that they have cognizable property rights arising out of their contracts with HUD. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986) (*Bowen*); *Peterson v. United States Department of Interior*, 899 F.2d 799, 807 (9th Cir.) (*Peterson*), *cert. denied*, 111 S.Ct. 567 (1990). Relying on *Rainier View*, the district courts held that such property rights had been established.

HUD argues that *Rainier View* was incorrectly decided. It urges us to reconsider the issues decided in *Rainier View* in light of section 801 of the HUD Reform Act and section 142 of Public Law No. 100-242 5100 Stat. 1850 (1988). HUD alleges that through these amendments, Congress retroactively clarified the original meaning of section 8. HUD also points to two lower court decisions as authority contrary to *Rainier View*. *See Sheridan Square Partnership v. United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Association v. United States*, 22 Cl. Ct. 649 (1991).

We have previously held that in certain cases involving statutory interpretation, a three-judge panel may reconsider the decision of an earlier panel when intervening legislation retroactively clarifies the meaning of a statute. *Landreth v. Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (*Landreth*). There, we held that we were not bound by a prior circuit decision interpreting the IRS Code because a subsequent congressional amendment clarified the meaning of the disputed section. The owners argue that *Landreth* is inapplicable because *Rainier View* was principally a contract, and not a statutory, interpretation case, thereby rendering intervening legislative clarification irrelevant.

Although *Rainier View* discussed the provisions of section 8 in conjunction with its contract analysis, its decision turned on HUD's election in the contracts of the "formula" method for determining rent adjustments. *Rainier View*, 848 F.2d at 990. As a matter of contract law, *Rainier View* held that:

> In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity.
>
> . . . .
>
> We thus hold that the contract unambiguously support [sic] Rainier's interpretation.

Id. at 991.

HUD correctly points out that the statute is not wholly irrelevant here because any contract entered into by HUD without congressional authorization would be invalid as *ultra vires*. *Peterson*, 899 F.2d at 807. Even so, *Rainier View*'s interpretation of

the contracts, while not the only approach available to that court, is nevertheless consistent with the language of section 8. Thus, *Peterson* is not an impediment to affirmance. Although HUD disagrees with the interpretation of the contracts set forth in *Rainier View*, this does not disturb the basis for that court's decision, or the consistency of that decision with the underlying statutory language. Because we hold that *Rainier View* was decided as a matter of contract law, we are not free to reexamine the issues in that case under the *Landreth* rule.

HUD contends that if we hold this dispute to be contractual and not statutory for purposes of reexamination under *Landreth*, we lack jurisdiction and must transfer this case to the court of claims, 28 U.S.C. § 1491. We point out that *Rainier View* faced the same question. Because that court decided the case, it must necessarily have determined that jurisdiction was proper. We must follow that decision here.

III

We next address the question whether the owners' rights to receive formula rent increases for section 8 properties are vested. HUD argues that the "property clauses" of the Constitution do not require the federal government "to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977) (*United States Trust*). HUD relies primarily on *Bowen*, 477 U.S. at 52, for the argument that Congress, as an exercise of its constitutional sovereign powers, can change statutory language underlying a government contract, thereby changing the contract itself. The "sovereign's power to enact sub-

sequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless 'surrendered in unmistakable terms.' " *Peterson*, 899 F.2d at 808, *quoting Bowen*, 477 U.S. at 52.

In *Bowen*, states participating in the federal social security system challenged Congress's retroactive repeal of a statutory provision permitting them to terminate participation in the program unilaterally. The Supreme Court rejected the states' due process argument, holding that the act "created no contractual rights." 477 U.S. at 52. The Court stated that the statute did not create any vested rights in light of the fact that Congress expressly reserved the "right to alter, amend, or repeal any provision" of the statute. *Id.* at 51-52 (citation and internal quotations omitted).

Here, the owners do not challenge Congress's power to amend the terms of the underlying legislation in the exercise of "public and general acts of a sovereign." *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). Instead, they assert that their contract rights are supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934), (*Lynch*), and *Perry v. United States*, 294 U.S. 330 (1935) (*Perry*).

Lynch involved Congress's attempt to withdraw from its obligation to make payments on insurance contracts in order to save money during the Great Depression of the 1930s. The Court held that the payment of premiums by the beneficiaries created vested property rights. 292 U.S. at 576-77. It stated that "Congress was free to reduce gratuities deemed excessive," but "was without power to reduce expenditures by abrogating contractual obligations of

the United States." *Id.* at 580. In *Perry*, 294 U.S. at 353-54, a case involving bond debt, the Court likewise held that "Congress has not been vested with authority to alter or destroy those obligations."

HUD contends that the instant appeals are more akin to cases rejecting due process attacks on retroactive "curative" legislation. *See Wiggins v. IRS*, 904 F.2d 311, 316-17 (5th Cir. 1990); *Opdyke Investment Co. v. City of Detroit*, 883 F.2d 1265, 1274-76 (6th Cir. 1989); *Temple University v. United States*, 769 F.2d 126, 134-35 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); *Long v. IRS*, 742 F.2d 1173, 1183-84 (9th Cir. 1984). HUD argues that curative legislation by its very nature affects a "property" interest because it eliminates an otherwise accrued claim against the government. Thus, HUD likens this "property" interest to the contract rights asserted by the owners.

Although HUD is correct that a claim may constitute a property right, *see In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), its argument is not persuasive because it fails to focus on the source of the right affected by the legislation. If the asserted right is a benefit gratuitously conferred by statute, as in *Bowen*, the repeal or amendment of that statute is not subject to a substantive due process challenge. The owners here, however, have bargained-for *contract* rights, supported by independent consideration. Although these rights were created because a statute authorized HUD to enter into contracts with private developers, this fact does not detract from the fundamentally contractual nature of those rights. We question whether it is within the purview of Congress's power to engage in contract interpretation. It certainly is the duty of the judiciary, a duty that was exercised in *Rainier View*. Thus, section 801 is not "curative" in the sense urged by HUD.

HUD also argues that *Peterson* and *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958), are examples of curative legislation impacting bargained-for contract rights. In *Peterson*, water districts challenged a clause in the Reclamation Reform Act of 1982 requiring the districts to make higher payments for water that was resold for irrigation use on leased lands. The water districts argued that the amendment constituted an impairment of their contracts with the government. *Peterson*, 899 F.2d at 807. We held that the water districts had no implied contractual right to buy cheap water for leased lands, and that the Reclamation Reform Act did not deprive them of due process. *Id.* at 809-10.

Similarly in *The Darlington*, 358 U.S. at 87, 90-91, the Supreme Court held that due process was not violated when Congress amended section 608 of the National Housing Act (NHA). The amendment stated that the NHA originally intended to preclude owners from renting to transients if the owners were receiving federally subsidized mortgage insurance. *Id.* at 86. The Court held that the *implied* contractual right asserted by the plaintiffs had not been established, and that the *original* intent of the NHA was, in fact, to exclude transients. *Id.* at 90.

These cases are distinguishable as instances where courts declined to interpret contracts as containing implied provisions foreclosing the exercise of sovereign power by the government. Neither the claim in *Peterson* nor in *The Darlington* was based on an ex-

plicit contractual provision. In contrast, *Rainier View* held that HUD *explicitly* limited its statutory options by choosing the formula methodology for adjusting rents and bound itself to that choice in the contracts with the owners. Thus, the district courts did not err in holding that the owners had acquired vested property rights.

IV

For the reasons stated above, we conclude, in accord with *Rainier View*, that the owners have a vested property interest in formula-based rent adjustments pursuant to their section 8 contracts. The obligation of the United States to make payments on these interests is unambiguously stated in section 1.6 of the contracts themselves. HUD does not dispute that section 801 substantially impairs the owners' exercise of these property rights. Thus, the remaining question is whether Congress's abrogation of the owners' rights by section 801 of the HUD Reform Act violates due process.

HUD argues that Congress may legislate retroactively in ways that affect private property rights as long as a rational basis for the legislation exists. *United States v. Sperry Corp.*, 493 U.S. 52, 65 (1989). The owners contend that section 801 is subject to heightened scrutiny. Under the contract clause analysis applicable to the states, courts have applied the standard of "reasonable and necessary to serve an important public purpose" in reviewing state modifications of its own obligations. *United States Trust*, 431 U.S. at 25. The contract clause does not apply to the federal government, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9

(1984), and we have not previously decided whether a like standard applies to Congress under the fifth amendment. The Supreme Court, however, has stated in dicta that a "dual standard of review" applies under the due process clause, with heightened scrutiny of the federal government's impairment of its own obligations. *United States Trust*, 431 U.S. at 26 n.25.

Neither district court resolved this issue because both courts held that Congress abrogated vested contract rights solely to save money. In *Lynch*, 292 U.S. at 580, the Supreme Court ruled that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." The Court subsequently reaffirmed this principle, stating that "Congress does not have the power to repudiate its own debts . . . simply in order to save money." *Bowen*, 477 U.S. at 55; *see also United States Trust*, 431 U.S. at 26 n.25; *Peterson*, 899 F.2d at 808 n.16, 813 n.20. We do not need to decide whether a heightened standard applies to the federal government's impairment of its own obligations if Congress unconstitutionally abrogated the owners' vested rights in order to save money.

HUD concedes that the government may not alter contracts simply to save money, but contends that these appeals are distinguishable from *Lynch* and *Perry*. It argues that the government acknowledged the validity of the debt in *Lynch* and *Perry*, whereas here, Congress enacted section 801 to clarify that no debt obligation exists at all. We have already rejected this argument, however, in ruling that *Rainier View* established a vested property right. This is not a case where Congress alters the effect of a court decision by amending a statute. Through section 801, Congress has attempted to change section 8's original

meaning retroactively, 14 years after its enactment. The fact that Congress does not recognize its obligation under the contracts as interpreted by *Rainier View* does not affect the validity of the owners' rights, or Congress's inability to alter them by retroactively amending the underlying statute.

HUD also denies that Congress acted solely to save money. It argues that section 801 was enacted as a compromise to end litigation over the issue of the appropriate method for determining annual section 8 rent adjustments. HUD points to no authority permitting Congress to legislate a compromise to disputes involving vested property rights in order to prevent costly or wasteful litigation. HUD's argument again assumes the absence of any vested property right in annual formula rent adjustments, an issue that we have decided against it.

HUD is unable to present any argument explaining section 801 as anything other than Congress's attempt to save resources and money by legislating a compromise to its disputes with the owners. We hold that these cases fall within the scope of *Lynch* and *Perry*, and that through section 801, Congress has attempted to reduce an obligation in order to save money. Although HUD and Congress do not recognize this obligation, it has been established by the final judgment in *Rainier View*. Therefore, we hold that section 801 unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND UUBAN DEVELOPMENT, DEFENDANTS

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

[Filed Sep. 20, 1990]

THIS MATTER comes before the court on plaintiffs' and defendants' cross-motions for summary judgment. Having reviewed the motions together with all documents filed in support and in opposition, having heard oral argument and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs in this case are owners of housing projects which fall under Section 8 of the United States Housing Act of 1937 as amended, 42 U.S.C. § 1437f. The Section 8 housing program is administered by defendants Secretary and Department of Housing and Urban Development (collectively "HUD"). Pursuant to Section 8 as enacted in 1974, private developers were encouraged to submit proposals to HUD for the construction and operation of federally subsidized low-income housing. The developers chosen by HUD then entered into Housing Assistance Payment (HAP) contracts either with HUD directly or with local public housing agencies authorized by HUD to act as contract administrators. Among other things, these HAP contracts provided for the periodic adjustment of the maximum monthly rent to reflect fair market rents in the local area.

In the early 1980's, a dispute arose between certain Section 8 project owners and HUD concerning the proper method for determining rent adjustments. The owners insisted that, pursuant to their HAP contracts, they were entitled to rent adjustments based on the application of Automatic Annual Adjustment Factors (AAAFs) published each year by HUD. HUD, on the other hand, asserted that it had the right in its discretion to conduct rent comparability studies based on individualized market surveys.

The Ninth Circuit settled the dispute in *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), by holding that the HAP contracts into which HUD had entered clearly and unambiguously required HUD to apply the AAAFs in adjusting rents.

The court noted that while the statutory language of Section 8 would have permitted HUD to use either the AAAFs or comparability studies, HUD had made a binding election of the AAAFs method under the contract and could not change its mind.

In 1989, however, Congress revisited Section 8 by passing an amendment known as Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, Dec. 15, 1989. In brief, Section 801 prospectively authorizes HUD to adjust rents based on rent comparability studies. As for its retroactive effect, Section 801 applies to all owners whose rerts were previously adjusted on the basis of comparability studies or whose contracts required them to request an adjustment and who failed to do so because of an anticipated negative adjustment. Regarding those owners, Section 801 authorizes HUD to adjust the rents from 1980 to the present by either applying the AAAFs to that portion of the contract rent not attributable to the debt service, or by multiplying 30% of the applicable AAAF by the entire contract rent, whichever is greater.

Plaintiffs in this case allege that Section 801 is unconstitutional on the grounds that it violates their rights to due process under the Fifth Amendment to the United States Constitution.[1] They contend that it

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[1] Plaintiffs also originally alleged that Section 801 resulted in a taking without just compensation contrary to the Fifth Amendment of the United States Constitution. Based on this claim, which it construed as one for damages, HUD contended that the proper jurisdictional forum for the case was in the United States Court of Claims. *Compare Preseault v. Interstate Commerce Commission*, 110 S. Ct. 914 (1990), in which

does so by impairing their vested contractual rights to rent adjustments based on the AAAFs as provided in their HAP contracts with HUD or authorized public housing agencies. HUD is equally insistent on the constitutionality of Section 801. Both plaintiffs and HUD now cross-move for summary judgment.

II. LEGAL ARGUMENT

A. *Ripeness*

Before turning to the substance of the case, HUD asserts that, insofar as the prospective effect of Section 801 is concerned, plaintiffs' claims are not ripe because HUD has not yet issued regulations implementing Section 801.[2] Accordingly, no final decisions have been made regarding the application of the regulations to any particular housing project.

This argument has no merit. Plaintiffs make it perfectly clear that they are challenging the constitu-

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the United States Supreme Court held that takings claims for the recovery of damages from the federal government are premature until the property owner has exhausted the remedies available in the Court of Claims.

Without acknowledging any merit in HUD's jurisdictional argument, plaintiffs stated in their responsive brief and reaffirmed at oral argument that they were no longer pursuing a Fifth Amendment taking theory. Plaintiffs' Memorandum of Authorities in Opposition to Defendant's Motion for Summary Judgment and in Reply to Defendant's [sic] Opposition to Plaintiffs' Motion for Summary Judgment, p 6 n.9. HUD recognized at oral argument that plaintiffs' decision to tailor their case mooted its jurisdictional argument.

[2] The implementing regulations were to have been issued within six months of the passage of the legislation, *i.e.*, by June 15, 1990. As of the date of oral argument on September 4, 1990, no regulations had been issued.

tionality of the legislation on its face as violative of their contract rights. They are not asking the court to examine the manner in which Section 801 will be applied to each individual housing project; instead they request a broad declaratory ruling that the legislation is unconstitutional because it conflicts with the language of their HAP contracts guaranteeing them the right to rent increases based on the AAAFs. Thus, the court has no need to consider the effect of regulations or to wait and see what steps HUD takes to implement Section 801.

B. *Analysis of Constitutionality*

Although plaintiffs and HUD reach entirely different conclusions, they do agree on the elements of the analysis to be applied in determining the constitutionality of Section 801. The following questions must be addressed:

1. Pursuant to the HAP contracts, do plaintiffs have a contractual right to rent adjustments based on the AAAFs?
2. If plaintiffs do have a contractual right, is it vested?
3. If plaintiffs have a vested contract right, does Section 801 substantially impair the exercise of that right?
4. If there is a substantial impairment of plaintiffs' vested contract rights, then is the congressional purpose sufficiently important to permit abrogation of those rights?

The court will consider each of these questions in turn:

1. *Existence of Contract Rights*

Plaintiffs and HUD agree that, in order to assert a due process claim under the Fifth Amendment, plaintiffs must establish that they have a cognizable property right arising out of the HAP contracts. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986); *Peterson v. United States Department of Interior*, 899 F.2d 799, 807 (9th Cir. 1990).

Plaintiffs argue that the answer is plain. As discussed above, the Ninth Circuit unequivocally held in *Rainier View* that plaintiffs have a contractually guaranteed right to rent adjustments based on the AAAFs:

> Under the [Section 8] statute, HUD could choose either a market survey method *or* a formula method. In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute[3] and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in

[3] The overall limitation provision to which the Ninth Circuit refers states that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; . . ."

> the contract a nullity. It would make all rent adjustments depend on the market survey method. . . .
>
> In sum, the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another. That is clear from the statutory language and HUD's own regulations interpreting the statute. We thus hold that the contract unambiguously support [sic] [plaintiffs'] interpretation.

(Emphasis in original.) 848 F.2d at 991.

HUD's response is two-fold. First, it contends that, pursuant to Section 801, Congress has now reaffirmed HUD's authority to use comparability studies as a limitation on AAAF rent adjustments, thereby expressly rejecting the Ninth Circuit decision in *Rainier View* that Section 8 owners have a right to AAAF adjustments. Relying on cases like *Regents of the University of the University of California v. Bakke*, 438 U.S. 265, 349-50 (1978), HUD argues that this court must defer to a subsequent congressional pronouncement regarding the proper interpretation of a statute. *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); and *Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973).

The court agrees with HUD that heed should be paid to guidance from Congress about the proper

interpretation of statutes. Unfortunately for HUD, that is not the issue in this case. There is no question that HUD had the authority under the statute when it entered into HAP contracts to use comparability studies as a limitation on AAAF adjustments, and *Rainier View* itself so states. But what *Ranier View* then went on to hold is that, despite HUD's statutory authority to choose differently, it elected to limit itself *contractually*. It is not within the purview of Congress to engage in contract interpretation; that is a function of the judiciary which it duly exercised in *Rainier View*.

HUD also argues that even if the *Rainier View* ruling regarding Section 8 owners' rights must be followed, plaintiffs in this case were not parties to *Rainier View*. HUD contends that this court must analyze plaintiffs' claims under the law as it now stands under the new legislation. *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1172-73 (9th Cir. 1979), *citing Bradley v. School Board of City of Richmond*, 416 U.S. 696, 712 (1974); *Peterson v. United States Department of Interior*, 899 F.2d 799 (9th Cir. 1990).

The court rejects HUD's argument. For one thing, this court is bound by the Ninth Circuit decision in *Rainier View*. Insofar as the provisions in plaintiffs' HAP contracts are the same as those construed in *Rainier View*, this court must follow that decision. Moreover, as the court pointed out above, the Ninth Circuit already recognized HUD's statutory authority to conduct comparability studies when it reached its decision in *Rainier View*. Since the new legislation merely reaffirms that point, HUD has no basis for arguing that the existence of the new legislation

should lead to any different result in this case on the issue of *contractual* interpretation decided by *Rainier View*.[4]

2. *Vested Nature of Contract Right*

Having established that plaintiffs do have a contract right to AAAF adjustments under their HAP contracts, the court turns to the question of whether that right is vested.

As a preliminary matter, the court notes that plaintiffs do not challenge the authority of Congress to amend the Section 8 program. There is no doubt that Congress had full authority to alter the terms of the program or even to abolish it completely. Plaintiffs' contention is instead that, in keeping with Fifth Amendment due process considerations, Congress did not have the power to nullify the contract obligations incurred by the federal government pursuant to HUD's HAP contracts with plaintiffs.

HUD responds that, according to well-established principles governing the exercise of sovereignty,

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[4] For this reason, *Peterson v. Department of Interior*, 899 F.2d 799 (9th Cir. 1990), on which HUD relies is inapposite. In *Peterson*, plaintiffs alleged that the Reclamation Reform Act of 1982 violated their Fifth Amendment due process rights by depriving them of subsidized water which they were contractually entitled to receive from federal reclamation projects. As HUD points out, the Ninth Circuit found no constitutional violations because plaintiffs' contracts, read in conjunction with the underlying statutory authority, did not grant plaintiffs any vested rights to subsidized water. In *Rainier View*, on the contrary, the Ninth Circuit concluded that plaintiffs did possess vested contract rights. The court notes that Judge Norris, the author of the *Peterson* decision, was also on the panel which decided *Rainier View*.

Congress retains the power to modify obligations of the United States by subsequent legislation unless it expressly relinquishes that power. HUD relies on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), in which the United States Supreme Court held:

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), we have declined in the context of commercial contracts to find that "a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). . . . [S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to that sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."

477 U.S. at 52.

Before reaching any conclusion about the applicability of the reasoning in *Bowen* to this case, the facts bear inspection. In *Bowen*, the Supreme Court considered whether the states had a vested contractual right to terminate their participation in the Social Security system. When Congress initially passed the Social Security Act of 1935, 42 U.S.C. § 301 *et seq.*, it excluded from coverage all employees of states and their political subdivisions. In 1950, however, Congress responded to pressure from states seeking So-

cial Security coverage for their employees by enacting § 418, which authorizes voluntary participation by states in the Social Security system. States electing coverage entered the system by executing an agreement with the Secretary of Health and Human Services. State and local entities from all fifty states thereafter entered into § 418 agreements.

As enacted in 1950, § 418 also allowed states to terminate their agreements upon two years advance notice in writing to the Secretary. Until the mid-1970's, very few states elected to do so. But beginning in 1977, the number of such terminations increased until they exceeded the number of newly-covered employees. In 1983, Congress, fearing for the integrity of the Social Security system, amended § 418 by repealing the termination provision. The amendment applied to all terminations even if notice had been filed prior to the enactment of the legislation.

The state of California and several of its public agencies filed suit, arguing that they had been unconstitutionally deprived of their contractual right under the § 418 agreement to terminate their participation in the Social Security system. The United States Supreme Court concluded in *Bowen* that, given the nature and provisions of the legislation pursuant to which the federal government entered into the § 418 agreements, the states did not acquire any enforceable contract rights. Whatever contractual arrangement the parties had reached thus remained subject to change by subsequent legislation.

Having carefully considered the ruling in *Bowen*, this court finds that it is inapposite. As the Supreme Court stressed, the termination provision of the § 418 agreement

> constituted neither a debt of the United States, see *Perry v. United States, supra,* nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States, supra.* The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

Id. Given these circumstances, the Supreme Court concluded that the termination provision of the § 418 agreement did not rise to the level of "property" within the meaning of the Fifth Amendment and could not confer any sort of vested right in view of Congress' reserved power to amend the legislation.

The situation before this court is very different. Unlike the § 418 agreements, the HAP contracts were bargained-for agreements for which plaintiffs did pay independent consideration. As such, the contracts here are akin to the agreements in *Perry v. United States*, 294 U.S. 330 (1935) (life insurance contracts between the federal government and private parties) and *Lynch v. United States*, 292 U.S. 571 (1934) (contract between federal government and private holders of federal bonds) which the Supreme Court was careful to distinguish from the situation in *Bowen.* Like the argreements in *Perry* and *Lynch*, the HAP contracts clearly do create financial obligations on the part of the United States which vest contract rights in plaintiffs.

Indeed, the HAP contracts included a provision pledging the full faith and credit of the United States government to the payment of the obligations incurred under the contract. Paragraph 1.6 of the HAP contracts stated: "*Government Assurances to Owner.* The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and and that funds have been obligated by the government for such payment."

3. *Substantial Impairment of Contract*

If, as the court has concluded above, plaintiffs had vested contractual rights to rent adjustments pursuant to the AAAFs, then HUD does not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights.

4. *Permissible Abrogation of Contract Rights*

Having found that the plaintiffs possess vested contract rights which are substantially impaired by Section 801, the court must finally consider whether Congress is, nevertheless, permitted to abrogate those rights in furtherance of a public purpose.

The parties differ significantly in their analysis of the appropriate standard to apply in deciding this question. HUD maintains that Congress need only have a rational basis for enacting Section 801.[5]

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[5] In support of this proposition, HUD cites *United States v. Sperry Corp.*, 110 S. Ct. 387, 396 (1989); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); and *Orrego v. United States Department of Housing and*

Plaintiffs, on the other hand, insist that the courts must use a heightened review standard when examining congressional legislation impairing the federal government's own contracts.[6] *Compare United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977), a case under the Contract Clause of the United States Constitution, Art. 1, § 10, cl. 1, in which the Court held that the Contract Clause was not an absolute bar to subsequent modifications of a state's own financial obligations: "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."

But despite their differences of opinion concerning the standard of review, both plaintiffs and HUD agree that Congress cannot abrogate vested contract rights solely to save money. In *Lynch*, 292 U.S. at 580, the Court stated categorically that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." The Court repeated this holding two years later in Perry, 294 U.S. at 352-54. More recent cases reiterating this principle include *Larionoff v. United States*, 533 F.2d 1167, 1179-80 (D.C. Cir. 1976), and *Orrego*, 701 F. Supp. at 1395-96.

Urban Development, 701 F. Supp. 1384, 1396-97 (N.D. Ill. 1988). Only the last case involves a contract between the federal government and a private party.

[6] Plaintiffs point to a few sentences from p. 477 of *Nowak on Constitutional Law* (1983) as well as some rather vague language from *Perry v. United States*, 294 U.S. 330, 350 (1935). *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978).

HUD argues strenuously that, while saving money may have been part of the congressional motivation for enacting Section 801, Congress also had several other purposes which rescue the legislation from unconstitutionality. These include: 1) effectuating the original congressional objective of avoiding excessive rents and rates of returns for Section 8 projects; 2) redressing HUD's inconsistent application of comparability studies; 3) ensuring a reasonable rate of return to Section 8 owners; and 4) resolving widespread disputes over HUD's use of comparability studies in adjusting Section 8 rents.

Regarding the first and third reasons as stated by HUD, these are simply thinly veiled attempts to recast the essential congressional purpose of saving money. As for the fourth justification for the legislation, resolving widespread disputes, the only reason for the continued existence of a controversy was HUD's refusal to accept the *Rainier View* decision as binding. The second justification is at first blush somewhat more convincing. But only if a threshold determination is made that comparability studies are even applicable does Congress even have to reach the issue of how to conduct them. In the case of plaintiffs, that threshold showing has not been made.

Compare Larionoff, supra at 1180, in which the District of Columbia Circuit reviewed congressional reasons for repealing a military reenlistment bonus. The court found that, although the stated reason was to increase military flexibility in granting bonuses, "our review of the legislative history leads us to conclude that the Congress was primarily concerned with reducing government expenditures by more narrowly tailoring the reenlistment bonus scheme to

actual military requirements." The *Larionoff* court accordingly held that the legislation was unconstitutional.

III. CONCLUSION

For the above-stated reasons, the court finds that Section 801 is unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment.[7]

DATED at Seattle, Washington this 19th day of September, 1990.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

[7] Given this result, the court need not address plaintiffs' other contention that Section 801 constitutes a questioning of the public debt in violation of the Fourteenth Amendment to the United States Constitution.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case Number: C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, ET AL., DEFENDANTS

JUDGMENT IN A CIVIL CASE

☒ *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court finds Section 801 to be unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment: plaintiffs' motion for summary judgment is granted; defendants' cross motion for summary judgment is denied.

Date 21 September 1990

BRUCE RIFKIN
Clerk

/s/ Elizabeth Tyree
ELIZABETH TYREE
(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development, ET AL., DEFENDANTS

ORDER GRANTING SUPPLEMENTAL RELIEF IN PART

[Filed Apr. 16, 1991]

THIS MATTER comes before the court on plaintiffs' motion for supplementary relief based upon declaratory judgment. Having reviewed the matter, together with all documents filed in support and in opposition, and being fully informed, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Plaintiffs are owners of housing projects that fall under Section 8 of the United States Housing Act of 1937 as amended, 42 U.S.C. § 1437F. The Section 8

housing program is administered by defendants Secretary and Department of Housing and Urban Development ("HUD"). As discussed in prior orders, this case is part of an ongoing dispute between housing project owners and HUD over how rent adjustments are to be computed.[1]

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, Dec. 15, 1989, authorized HUD to adjust rents on Section 8 housing projects based on rent comparability studies. Plaintiffs, however, had entered into contracts with HUD entitling them to rent adjustments based on the application of Automatic Annual Adjustment Factors ("AAAFs"). On September 20, 1990, this court found that Section 801 impaired plaintiff's vested contractual right to rent adjustments based on the AAAFs as provided in their contracts with HUD or authorized public housing agencies. HUD's January 1991 appeal of that decision is pending before the Ninth Circuit Court of Appeals. In February, HUD

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[1] In *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), the Ninth Circuit held that prior contracts between Section 8 housing project owners and HUD clearly and unambiguously required HUD to apply the AAAFs in adjusting rents. After the Ninth Circuit entered that ruling, plaintiffs had to petition this court to order HUD to fulfill their contractual obligations. *See* Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Supplemental Relief, Exhibit A (*Rainier View Associates v. United States, et al.*, No. C83-997R, Order Granting Government's Motions for Clarification and Entry of Judgment, Denying Stay Pending Appeal and Denying Plaintiffs' Motion for Contempt Judgment (April 15, 1988)).

began making rent adjustments based on the applicable AAAFs. Declaration of Robert L. Stettner, para. 4 and attachment 1. The AAAF-based rent adjustments are made from the latest HUD-approved rent, not from what the rent would have been had HUD been applying the AAAFs as they were obligated to under their contracts with plaintiffs. Defendants' Memorandum in Opposition, at 4 n.4.

Plaintiffs now request that this court enforce its declaratory judgment by: (1) ordering HUD to *immediately* set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs; (2) ordering HUD to make all prospective adjustment based on the AAAFs; (3) ordering HUD to pay plaintiffs the AAAF rents wrongfully withheld by HUD through the date of the order; (4) enjoining HUD from imposing selective and discriminatory practices on plaintiffs, including the refusal to process rent adjustments and reserve disbursement because project funds were used to enforce plaintiffs' rights against HUD, and the refusal to correct mathematical errors and otherwise deal in good faith with plaintiffs; and (5) awarding plaintiffs attorneys fees and expenses incurred in bringing this motion pursuant to 28 U.S.C. § 2412(d).[2]

II. DISCUSSION

As noted above, this is not the first time that HUD, despite adverse judicial rulings, has been reluctant to fulfill its contractual obligations to apply rent adjustments based on AAAFs. HUD now contends

[2] Plaintiffs also ask the court to order its September 20, 1990, order binding on the HUD and its officers and agents. Such an order is unnecessary. All of this court's orders in this case are binding on the parties.

that an additional order from this court is not necessary because: (1) this court no longer has jurisdiction to grant the supplemental relief requested by plaintiffs; (2) even if this court has jurisdiction, HUD would be entitled to a stay pending appeal; (3) money damages such as those requested by plaintiffs cannot be obtained from the government absent a waiver of sovereign immunity; (4) the injunctive relief requested by plaintiffs with respect to discriminatory and selective treatment of plaintiffs has no basis in fact and is too vague to form the basis for relief; and (5) HUD has agreed to make rent adjustments based on the applicable AAAFs pending the outcome of its appeal.

A. *Jurisdiction*

Where a notice of appeal has been filed, the district court retains jurisdiction only to enforce a judgment and may not alter or enlarge the scope of its judgment while that judgment is on appeal. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). Thus, the initial issue for the court is whether the plaintiffs' requested relief, if granted, would enlarge the scope of its judgment or whether it would merely enforce the judgment.

1. *Request for Injunctive Relief from Alleged Discriminatory and Selective Behavior*

Enjoining defendants from engaging in discriminatory or selective behavior toward the plaintiff Section 8 housing projects clearly would expand or alter the judgment. Such behavior was not before the court on plaintiffs' complaint for declaratory judgment. In addition, the vague allegations made

by plaintiffs and in the Affidavit of Janet Marie are an insufficient basis for granting injunctive relief since they do not specify particular, identifiable instances of selective and discriminatory behavior. Furthermore, Robert L. Stettner, head of the Seattle HUD office's division of Housing's Multifamily Loan Management Branch, denies that HUD has engaged in any discriminatory or selective behavior with respect to plaintiffs or Ms. Marie. Declaration of Robert L. Stettner, paras. 7, 9, 10.

2. *Request for Attorneys Fees*

Imposition of sanctions through award of attorneys fees or institution of contempt proceedings also would enlarge or alter a court's judgment. *See Donovan v. Mazzola*, 761 F.2d 1411, 1414 (9th Cir. 1985).

3. *Request for Prospective and Retroactive Rent Adjustments Based on AAAFs*

Plaintiffs final requests for relief are that the court order defendants to: (1) immediately set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs; (2) make all prospective rent adjustments based on the AAAFs; and (3) pay plaintiffs the AAAF rents wrongfully withheld through the date of this order.

When the court ruled that Section 801 was unconstitutional, meaning unlawful, it assumed that HUD would discontinue using it as authority for making rent adjustments and would return instead to the manner specified in its contract with plaintiffs. However, apparently thinking that the court's order declaring Section 801 unconstitutional was merely an advisory opinion, HUD chose to ignore

it for five months. Only in February did HUD begin to make rent adjustments based on the applicable AAAFs. Declaration of Robert Stettner, para. 4 and attachment 1. Nonetheless, these rent adjustments were apparently based on the pre-existing rents and not on rents that would have resulted if past rent adjustments had been based on the AAAFs.

This court's holding that Section 801 is unconstitutional was not a whim. The court expected HUD to act in accordance with that ruling. Apparently HUD is incapable of doing so without further guidance. Such additional guidance does not enlarge or alter the scope of the September 20, 1990, order, rather it is designed only to effectuate it. Pursuant to 28 U.S.C. § 2202 this court has the authority to grant the relief necessary to effectuate a declaratory judgment.[3]

B. *Stay Pending Appeal*

HUD has not asked for a stay of this court's September 20, 1990, order holding Section 801 unconstitutional, nor would it be automatically entitled to such a stay. Although the presumed constitutionality of an act of Congress weighs in favor of granting a stay pending appeal, *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984), the court must still examine the moving party's likelihood of success on the merits and chances of irrepara-

[3] Defendants' reliance on *Steffel v. Thompson*, 415 U.S. 452, 472, 483, is misplaced. Defendants' Memorandum in Opposition at 3 n.3. *Steffel* dealt with a federal court's power to enjoin state law enforcement activities to enforce a declaratory judgment. At issue in this case is enforcement of a declaratory judgment holding a federal statute unconstitutional.

ble harm. *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983). However, until HUD moves for a stay of enforcement of the September 20, 1990, order holding Section 801 unconstitutional, this court will not further address the merits of staying any enforcement orders pending appeal.

C. *Enforcement Prohibited by Sovereign Immunity*

HUD contends that sovereign immunity, absent a waiver, prohibits an award of money damages through specific enforcement of contract rights. The court notes initially that plaintiffs here, with the exception of their request for attorney's fees, do not ask for money damages except in enforcement of existing contract rights. In addition, HUD's argument that sovereign immunity bars this court from specifically enforcing plaintiffs' contract rights is not persuasive. The authority cited by HUD, *Price v. GSA*, 894 F.2d 323 (9th Cir. 1981), refers to limits on specific enforcement of pre-award contract rights, not specific enforcement of *existing contract rights.*

Plaintiffs here ask only that HUD comply with this court's ruling that Section 801 is unconstitutional by making retroactive and prospective rent adjustments through application of the AAAFs, a remedy this court awarded previously in a similar effort by Section 8 housing project owners to enforce their existing contract rights. *Rainier View Associates v. United States, et al.*, No. C83-997R, Order Granting Government's Motions for Clarification and Entry of Judgment, Denying Stay Pending Appeal and Denying Plaintiffs' Motion for Contempt Judgment (April 15, 1988). *See also Acacia Villa v. Kemp, et al.*, No. 90-0390 MRP (Sx), Final Judgment Pursuant to

Fed. R. Civ. P. 54(b) (C.D. Cal. Oct. 31, 1990) (declaring Section 801 unconstitutional and ordering HUD to pay future rent increases by applying the AAAFs to the rent that would have been in force if HUD had applied the AAAFs in the past without rent comparability studies).

III. CONCLUSION

In summary, it is well within this court's power under the Declaratory Judgment Act, 28 U.S.C. § 2202, and within its jurisdiction pending appeal to enforce its September 20, 1990, order holding Section 801 unconstitutional.

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) plaintiffs' motion for supplementary relief is GRANTED in part;

(2) defendant is to set current rents at the levels that would have resulted if past rent adjustments had been based on the AAAFs;

(3) defendant is to make all prospective rent adjustments based on the AAAFs;

(4) defendant is to pay plaintiffs the AAAF rents wrongfully withheld from the date of its September 20, 1990, order through the date of this order; and

(5) plaintiffs' requests for attorneys fees and for an injunction barring defendants from selective and discriminatory behavior toward plaintiffs are DENIED.

DATED at Seattle, Washington this 16th day of April, 1991.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 90-390 MRP

ACACIA VILLA, A California Partnership, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

MEMORANDUM OF DECISION

[Filed Oct. 31, 1990]

The Court having read and considered all the papers filed in support of and in opposition to the plaintiffs' motions for partial summary judgment and defendants' motion for summary judgment has concluded that:

I. *Background*

Plaintiffs are private developers who, between 1974 and 1988, entered into long term contracts with the Department of Housing and Urban Development ("HUD") to provide low-income rental housing. These contracts, known as Housing Assistance Payments ("HAP") contracts, were entered into pursuant to Section 8 of the Housing Act of 1937, as amended, 42 U.S.C. § 1437f ("Section 8"). Section

8 provides rent subsidies to low income families. Those families pay rent based upon a percentage of their income, and the federal government pays the difference between the tenant's contribution and the contract rent of the unit directly to the developer. The contract rent—the maximum monthly rent to which the project owner is entitled—is based upon the original rent specified in the HAP contract, adjusted at least annually to reflect changes in fair market rentals. Prior to its amendment in 1988, Section 8 authorized the Secretary to adjust rents by either of two methods: the formula method, under which the new contract rent would be determined by multiplying the existing contract rent by an "Automatic Annual Adjustment Factor" ("AAAF") published in the Federal Register, or the "comparability study" method, under which adjustments would be based on market surveys of comparable unassisted units.

Plaintiffs claim that under their HAP contracts application of the AAAF formula was expressly selected as the procedure for calculating rent adjustments, and that HUD has breached its contract by failing to make rent adjustment payments according to that formula since 1983. In 1988, the Ninth Circuit held, in *Rainier View Associates v. United States*, 848 F.2d 988 (9th Cir. 1988) *cert. denied*, 109 S. Ct. 2065 (1989), that contract language identical to the language in plaintiffs' contracts bound HUD to calculate rent adjustments according to the published AAAF formula.[1] *Rainier*, 848 F.2d at 991.

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[1] The *Rainier* court rejected the argument that an overall limitation provision in the contracts, providing that the rent adjustments could not result in material differences between rents charged for Section 8 units and comparable unassisted units, provided an independent basis for resorting to com-

HUD applied for but was denied certiorari in *Rainier* in 1989. Presumably to avoid a flood of litigation, HUD sent a letter to Section 8 project owners in the Ninth Circuit stating that it would comply with *Rainier*, and apply the AAAF method both retroactively and prospectively to all project owners who could sue in the Ninth Circuit without requiring them to file complaints.

Before HUD took action to comply with this policy, the Congress passed the HUD Reform Act of 1989, Pub. L. No. 101-235, § 801, 103 Stat. 2058, December 15, 1989 ("§ 801"), which prescribes a new method for computing rent adjustments. The statute establishes one procedure for recalculating past adjustments and a different procedure for determining future adjustments.

Section 801's retroactive provisions mandate recalculation of past rent adjustments where use of comparability studies did not raise rents to the level permitted by the AAAF method.[2] But § 801 does

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parability studies. The overall limitation provision states that "notwithstanding any other provisions of this Contract, adjustments . . . shall not result in material differences between rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents . . . to the extent that such differences may have existed with respect to initial Contract Rents." The court interpreted that language as a limitation on calculation of the formula rather than as an independent basis for making rent adjustments according to comparability surveys. *Rainier*, 848 F.2d at 991.

[2] The retroactive provisions apply for Fiscal Year 1980 until the regulations governing future rent adjustments under § 801 go into effect.

not adopt the traditional AAAF method to make this recalculation. Instead of applying the published AAAF formula to the full existing contract rent to determine the proper adjustment, § 801 applies the formula to a different amount—the portion of the existing rent which is not attributable to debt service. This obviously would result in a smaller increase than under the traditional AAAF method. Congress did, however, establish a floor in the new statute to ensure that the monthly adjustment would not be too small. Under § 801, developers are entitled to at least 30% of what they would have received if the AAAF had been applied to the entire existing contract rent each time an adjustment was made.

Plaintiffs contend that debt service represents between 17.8% and 66.1% of the monthly rental payment depending on the project. Therefore, plaintiffs argue, most developers will receive the 30% minimum under § 801. HUD does not seem to dispute that this will, in fact, be the result. Adjustments are to be paid over a period of three years, without interest. Plaintiffs contend that the § 801 recalculation deprives them of the full rent adjustments to which they are entitled under their HAP contracts.

The prospective provisions of § 801 authorize future rent adjustments to be made in one of three ways, depending upon the circumstances: 1) Application of the AAAF to the existing contract rent; 2) Where the AAAF would result in material differences between rents charged for comparable assisted and unassisted units, a Modified Annual Adjustment Factor ("MAAF") may be applied. The MAAF is determined by studying rents in a geographical area smaller than that used to calculate the AAAF; 3)

Where the MAAF also results in material differences, § 801 authorizes the use of comparability studies, conducted in accordance with new regulations to be established by the Secretary of HUD.

Project owners may request a one-time determination of contract rent to serve as the basis for future rent adjustments. The new contract rent will be the greater of the contract rent currently approved by the Secretary of HUD (unaffected by the recalculation in accordance with the retroactive provisions of § 801) or the contract rent as calculated under the retroactive provisions.[3] If the project owner makes no such request, the basis will be the currently approved contract rent. Plaintiffs argue that, regardless of which method of measuring future rent adjustments is applied to them, they necessarily are deprived of the full adjustments to which they are entitled under the HAP contracts.

Plaintiffs seek declaratory relief based upon breach of contract, violations of the Administrative Procedure Act, the Housing Act, HUD regulations and several provisions of the Constitution, including the Due Process Clause, the Takings Clause, and the Section Four of the Fourteenth Amendment. The defendants ("HUD" or "the government") invoke § 801 as a defense to all these claims. Plaintiffs argue that § 801 is unconstitutional, and therefore is no defense.

Plaintiffs' Motion for Partial Summary Judgment seeks summary judgment as to Count I, the breach

[3] That is, the contract rent that would be in effect had the AAAF been applied all along to a base rent equal to the contract rent less the amount of the contract rent attributable to debt service.

of contract claim, anticipates HUD's invocation of § 801 and argues that it is unconstitutional. After the filing of this motion, plaintiffs filed an amended complaint, adding Count X, which alleges that § 801 violates the plaintiffs' due process rights, effects a taking without just compensation, and is an unconstitutional questioning of the public debt. The subsequent Motion for Partial Summary Judgment as to Count X addresses issues already discussed in the earlier motion, except that they are framed as affirmative claims rather than as arguments raised in anticipation of defendant's defense. HUD's Motion for Summary Judgment takes the position that § 801 moots plaintiffs' claims, that this court does not have jurisdiction to review the constitutionality of § 801 and that, in any event, § 801 is constitutional.

II. *Discussion*

A. *Mootness of Plaintiffs' Claims*

HUD argues that plaintiffs' breach of contract claim is mooted by § 801 because § 801 provides an exclusive method for calculating past and future contract rents and rent adjustments. However, defendants at the same time concede that the challenge to the constitutionality of § 801 is not moot. The cases cited by defendant for the proposition that intervening legislation or clarifying amendments to legislation may moot a controversy by removing the basis for the plaintiff's claim did not involve new legislation whose constitutionality was being questioned. *See, e.g., Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-15 (1972) (per curiam) (challenge to tax for church parking lot mooted by repeal of the exemption where validity of the repealing legislation

was not contested); *U.S. Dept. of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (issue under Freedom of Information Act mooted by intervening legislation where validity of the intervening legislation was not challenged). Section 801 cannot be used as a basis for mooting any claims until the threshold question of its constitutionality is addressed.

B. *Ripeness of the Takings Claim*

The Court agrees with HUD that the takings claims are premature because plaintiffs must first avail themselves of the process provided by the Tucker Act. The Fifth Amendment does not preclude the government from taking private property; it only prevents taking without just compensation. A property owner has no claim for a taking where there is an adequate process for obtaining compensation, and that process yields just compensation. Thus, takings claims against the federal government are not ripe until the property owner has first sought and been denied just compensation through the Tucker Act process. *Pressault v. I.C.C.*, 110 S. Ct. 914, 921 (1990) (even if "rails-to-trails" statute gave rise to a taking, the requirements of the Fifth Amendment were satisfied since compensation was available through the Tucker Act); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195-96 (1985) (takings claims based on a zoning ordinance not ripe until plaintiff has been denied compensation through state's reverse condemnation process). In order to pursue a Tucker Act remedy in this court, plaintiffs would have to establish Little Tucker Act jurisdiction, which they have failed to do. Defendant, therefore, contends that the Claims Court has exclusive jurisdiction.

Plaintiffs respond with two arguments. First, they argue that a suit for denial of just compensation is not a prerequisite for takings claims involving deprivations of money as opposed to real property or other non-fungible goods. However, the cases cited by plaintiff for this proposition do not support it. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), is not a suit against the federal government. The other case cited by plaintiffs, *Fern v. United States*, 1990 U.S. App. LEXIS 11886 *8-*9, states only that where a Tucker Act remedy is inadequate, voiding of the statute in question or some other relief may be appropriate. It does not suggest that the plaintiff may, in such cases, dispense with the Tucker Act procedure.

Plaintiffs' second argument is that Little Tucker Act jurisdiction need not be shown because they are seeking declaratory relief, rather than pecuniary damages. However, the principles of *Pressault* apply even where plaintiff is seeking declaratory relief. Indeed, the plaintiffs in *Pressault* whose claims were dismissed for being unripe were themselves seeking a declaration that the statute in question effected a taking, in violation of the Constitution. *Pressault*, *supra*, 110 S.Ct. at 918. The issue here is the same issue that was decided in *Pressault*; this Court cannot find that a statute effects an unconstitutional taking before plaintiffs have sought and been denied just compensation. If the Tucker Act remedy proves inadequate in addressing plaintiff's prospective claims, plaintiffs may be entitled to return to the district court, but *Pressault* requires that they seek just compensation first.

Plaintiffs' retroactive claims could arguably be heard if § 801 were construed as having withdrawn

the Tucker Act remedy as to those claims; but for the reasons stated below, the Court finds that § 801 cannot be so construed. The statute describes the formula under § 801 as the "exclusive method" for calculating past rent adjustments. The Supreme Court, however, has held that a Tucker Act remedy always exists unless the statute unambiguously withdraws that remedy. *Pressault, supra*, 110 S. Ct. at 922-23. Provisions precluding any payments under an act without prior appropriation have been construed not to preclude a Tucker Act remedy. *Id.* at 922. Given this strong presumption against finding that the Tucker Act remedy has been withdrawn and the fact that § 801 makes no mention of the Tucker Act, the Court concludes that Tucker Act jurisdiction still exists. The takings claim cannot be adjudicated at this time.

C. *Ripeness of the Due Process Claims*

HUD makes two arguments with respect the ripeness of the due process claim. First, HUD argues that the due process claims must also be heard in Claims Court. The Court disagrees. The remedy for a violation of due process is not "just compensation" but "invalidation of the regulation [or statute] and if authorized and appropriate, actual damages." *Williamson, supra*, 473 U.S. at 197. *Williamson* does not support the proposition that where a takings claim must be heard in the Claims Court, the parallel due process claim must be heard along with it. The plaintiffs in *Williamson* claimed that a county zoning ordinance effected an unconstitutional taking and violated their due process rights. The *Williamson* court concluded that the takings claims in that case were

unripe both because the plaintiff had not first sought a variance in the ordinance and because the plaintiff had failed to seek just compensation through the state's reverse condemnation procedures. The unripeness of the due process claim was founded only upon the former issue. *Id.* at 199-200. There was no indication that the court considered the two claims inseparable. District courts have reached the merits on due process claims that, like the claims here, involved actions that could also have been characterized as takings. Those courts did not even address whether the due process claim should be heard in the claims court. *Orrego v. U.S. Dept. of Housing and Urban Development*, 701 F. Supp. 1384 (N.D. Ill. 1988) (due process challenge to the Emergency Preservation Act on ground that it impairs the federal government's obligations rejected on its merits); *Larionoff v. United States*, 533 F.2d 1167, 1180 (D.C. Cir. 1976), *aff'd.* 431 U.S. 864 (1977) (legislation retroactively denying reenlistment bonuses to which plaintiffs had a contractual right found unconstitutional). In *Alpine Ridge v. Kemp*, a suit brought by Section 8 project owners in the Western District of Washington raising an identical due process challenge to § 801, Judge Rothstein reached the merits without addressing this issue. *Alpine Ridge*, No. C89-1654R, Order Granting Plaintiffs' Motion for Summary Judgment (W.D. Wash., Sept. 20, 1990).

HUD's second argument is that plaintiffs' prospective claims are not ripe because it is not yet known how § 801 will affect each individual project. HUD points out that § 801 does not specify how or when comparability studies, the MAAF or AAAF will be used, and implementing regulations have not yet been

issued. While HUD is correct that the precise effect of § 801 is unknown, disposition of plaintiffs' motion does not depend on those facts. Plaintiffs' position is that § 801 *necessarily* deprives them of their right to future rent increases as provided in their contracts, no matter what the regulations provide. The Court agrees with plaintiffs that § 801, to the extent that it authorizes the use of the AAAF or MAAF, locks the project owners into a base rent that is lower than what would have been the base rent had the AAAF been used all along. The use of the depressed base rent in calculating future rent adjustments means that those adjustments will necessarily be lower than they would otherwise have been. Insofar as it authorizes the use comparability studies, § 801 deprives them of their right to have the adjustments calculated according to a formula, as provided in the HAP contracts. Plaintiffs are seeking declaratory relief that such a deprivation is unconstitutional, and there is no need to wait until the precise amount of the loss can be calculated before granting such relief. *See Alpine Ridge*, *supra*, at 7. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 201 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). *Pennell v. City of San Jose*, 485 U.S. 1 (1988), cited by defendant, is inapposite. The Court in *Pennell* held that a challenge to a tenant hardship provision of a San Jose rent control statute was premature where the provision gave the Hearing Officer absolute control over when and whether to apply the provision and there was no evidence that the clause had ever been

applied. In contrast with the *Acacia Villa* plaintiffs, plaintiffs in *Pennell* failed to show that injury was "certainly impending."

D. *Constitutionality of § 801*

1. *Property Right*

The threshold question for the due process claim is whether plaintiffs' contractual right to the AAAF adjustments is "property" that is protected by the Constitution. The Court holds that it is. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (renewable term insurance policies issued under the War Risk Insurance Act are property within the meaning of the Fifth Amendment, and provision of the Economy Act cancelling them is unconstitutional); *Perry v. United States*, 294 U.S. 330 (1935) (legislation abrogating federal government's obligation to pay principal and interest on certain bonds in gold coin found unconstitutional).

Defendants argue that *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986), is indistinguishable from this case and requires summary judgment in their favor. The Supreme Court in *Bowen* upheld the constitutionality of the Social Security Amendments of 1983. Those amendments took away the right of states to withdraw state and local government employees from the Social Security System. The right to terminate was expressly given in the contracts made pursuant to § 418, which authorized the voluntary participation of states in the Social Security System. In the mid-1970s, an alarming number of state entities began to terminate coverage. Congress concluded that these

withdrawals threatened the integrity of the Social Security System. Congress therefore amended § 418 to eliminate the right of withdrawal.

Congress had expressly reserved, in the statute, a right to "repeal, alter, or amend" the act at any time. The Court held that the effect of the reservation was to put the states on notice that "Congress retained the power to amend the law under which the Agreement was executed and by amending that law, to alter the Agreement itself." 477 U.S. at 54. The Court observed that the § 418 Agreement provided that its terms were "in conformity with" § 418, and that § 418 was "fully subject" to Congress' reserved power of amendment. *Id.* The Court recognized that Congress' reserved power does not permit it to repudiate its own debts, which constitute "property" of the lender, "in order to save money." *Id.* at 55.

The *Bowen* Court found that the contractual right to the termination clause was not properly within the meaning of the 5th Amendment. The Court noted that the termination language in the agreements tracked the language of that section, conferring no right beyond that contained in § 418 itself. *Id.* The Court distinguished *Perry*, noting that the provision did not constitute a debt of the United States, and *Lynch*, on the ground that it was not an "obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." *Id.* The court also considered significant the fact that clause was not unique to the agreement or a term over which the states had bargaining power. *Id.*

Acacia Villa falls into the category of cases that the *Bowen* Court was careful to distinguish. *Alpine Ridge*, *supra*, at 14. The plaintiffs' contracts are not gratuities; rather, they are bargained-for agreements, for which plaintiffs paid valuable consideration—they have built and maintained low-income housing in accordance with HUD's requirements. The contracts stated that they were backed by the "full faith and credit" of the United States. They are obligations of the United States, similar to those created in *Perry* and *Lynch*. Unlike the contracts in *Bowen*, the contract language here does not mirror the statute and was given a different construction from the statutory language. The HAP contracts, as interpreted in *Rainier*, give plaintiffs rights beyond the provisions of the authorizing legislation—they give plaintiffs a right to the calculation of rent adjustments according to the AAAF formula even though the authorizing legislation gave them no such right.

HUD argues that principles of sovereignty and interpretation of contracts require the Court to conclude that the HAP contracts never gave plaintiffs a right to AAAF payments. HUD is correct that Congress' failure to reserve the right to amend the Section 8 program does not preclude it from subsequently amending it. *Bowen* made it clear that the absence of an express statement of right to amend does not constitute a waiver. The "sovereign's power to enact subsequent legislation affecting its own contractual arrangements endures, albeit with some limitations, unless 'surrendered in unmistakable terms.'" *Peterson v. U.S. Dept. of Interior*, 899 F.2d 799, 808 (9th Cir. 1990) quoting *Bowen*, *supra*, 477 U.S. at 52. The Ninth Circuit in *Peterson* held that where there is no express reservation, a court must examine the contracts made pursuant to the statute to see whether Congress "surrendered in clear and absolute language" the right to amend. *Id.*

Two central principles govern the interpretation of government contracts. First, government contracts

should be construed, wherever possible to avoid foreclosing the exercise of sovereign power. *Bowen*, 477 U.S. at 52. Second, such contracts should be construed consistently with the legislative scheme that authorized them. *F.H.A. v. The Darlington*, 385 U.S. 84, 87-88 (1958).

Darlington involved a corporation that obtained federally subsidized mortgage insurance provided under § 608 of the National Housing Act in 1949. The statute was enacted to provide housing for World War II veterans and their families. The contract had no explicit provision with respect to the right to rent to transients. In 1954, Congress enacted legislation providing that § 608 was intended to exclude transients while the mortgage remained outstanding. The Court stated that while subsequent legislation is "not conclusive in determining what the previous Congress meant . . . [it] is entitled to weight when it comes to the problem of construction." *Id.* at 90. Taking into account the subsequent legislation, as well the language of the original statute and accompanying regulations, the court concluded that the statute in fact intended to exclude transients, and that the contracts, absent controlling language, should be read consistently with that intent. *Id.*

The Ninth Circuit in *Peterson* applied the principles propounded in *Bowen* and *Darlington* to water contracts authorized under the Reclamation Act. Under those contracts, between the Department of Interior's Bureau of Reclamation and public water agencies in California, the federal government agreed to provide water to those districts at a subsidized rate. The court found that among the purposes of the Reclamation Act were the creation of family-sized farms and wide distribution of the water subsidy. To

further those goals, Congress excluded from the subsidy tracts of more than 160 acres in the possession of a single owner. The Court concluded that the contracts did not contain an implied right to provide water to leased land, where such an implied right would allow the water districts to undermine the 160 acre limitation contrary to the purpose of the authorizing legislation. *Peterson*, 899 F.2d 799.

HUD argues that if this court applies the analysis of *Darlington* and *Peterson* to the instant case, it will be required to conclude that the HAP contracts never gave plaintiffs a right to the AAAF payments. In effect, HUD is arguing that *Rainier* was wrongly decided and that § 801 is evidence of earlier Congressional intent with respect to that issue. The Court disagrees.

The *Rainier* decision acknowledges that the Housing Act upon which the HAP contracts are based gave HUD the option of making rent adjustments according to comparability studies. It holds, nevertheless, that the HAP contracts *explicitly* chose the AAAF formulation. 848 F.2d at 991. The courts in *Darlington* and *Peterson*, in contrast, simply refused to interpret the contracts as containing *implied* provisions that would foreclose the exercise of sovereign power. This Court is bound by the Ninth Circuit's construction.

2. *Due Process Analysis*

Having established that there is a property right in issue, the next step in the analysis is to decide what level of scrutiny to apply to § 801. Defendants argue that these claims are subject to rational basis review, just as any other economic legislation would be. Plain-

tiffs contend that § 801 is subject to heightened scrutiny. To the extent that plaintiffs' argument is based upon analogies to the Contract Clause, it must fail. The standard applicable to states under the Contract Clause is not the same as the standard applicable to the United States under the Due Process Clause. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984). On the other hand, the Supreme Court in *United States Trust Company v. New Jersey*, noted in dicta that *Perry* and *Lynch* applied a "dual standard of review" under the Due Process Clause, with heightened scrutiny applied where the federal government is charged with impairing its own obligations. 431 U.S. 1, 25 n.25 (1977).

With the exception of *Orrego*, *supra*, courts faced with a challenge to legislation that abrogates a private party's vested rights under a federal government contract have not explicitly adopted either a heightened or rational basis level of scrutiny. *See Lynch*, *supra*, 292 U.S. at 580; *Perry*, *supra*, 294 U.S. at 350-51; *Larionoff*, *supra*, 533 F.2d at 1180; *Alpine Ridge*, *supra*, at 15. Most courts have not even addressed the question of what level of scrutiny applies. *See Lynch*, *supra* 292 U.S. at 580; *Perry*, *supra*, 294 U.S. at 350-51; *Larionoff*, *supra*, 533 F.2d at 1180.

These courts have recognized, however, that where the federal government enacts legislation that impairs its own contracts with private parties simply to save money, such legislation is treated differently than economic legislation that might incidentally affect the rights of parties to private contracts. *See Lynch*, *supra*, 292 U.S. at 580 (even in the face of the Great Depression, Congress was "without power to reduce expenditures by abrogating contractual obligations."); *Perry*, *supra*, 294 U.S. at 350-51 ("Congress is authorized to pledge [the] credit [of the United States] as an assurance of payment as stipulated. . . . To say that Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise . . .). Although *Perry* and *Lynch* are Lochner Era cases, they are still cited for the proposition that saving money is not sufficient justification for legislation that impairs federal obligations. *See e.g., Bowen*, *supra*, 477 U.S. at 41 ("Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money," citing *Perry* and *Lynch*); *United States Trust Company v. New Jersey*, 431 U.S. 1, 26 n.25 (1977); *Larionoff*, *supra*, 533 F.2d 1167, 1180. *Orrego*, which *explicitly* adopts a rational basis test, acknowledges that even under that test, to the extent that *Perry* and *Lynch* still have force, the court has a "limited role under [those cases] . . . to see whether Congress acted solely to relieve a debt in the face of a private party's vested rights." 710 F. Supp. at 1396.

The implication of *Orrego* is that saving money is not a legitimate purpose under any test. *Perry*, *Lynch*, and *Larionoff* could be read consistently with that analysis or instead, as having adopted a heightened level of scrutiny, as the *U.S. Trust* dicta suggests. But the court shares Judge Rothstein's view in *Alpine Ridge* that under either analysis, it is clear that § 801 must fall if it serves no other purpose than to save money. *Alpine Ridge*, *supra*, at 15.

The government offers four justifications for § 801 which it attempts to distinguish from saving money: first, avoiding excessive rents and rates of return for Section 8 projects; second, ensuring project owners a

reasonable rate of return; third, remedying the inconsistent application of comparability studies; and finally, resolving disputes over the use of comparability studies to adjust Section 8 rents.

The *Orrego* court appears to have accepted the alternative justification proffered by the government without further inquiry while the *Larionoff* court looked at the legislative history of the relevant statute to determine whether the justification advanced by the government was its actual purpose. *Orrego*, *supra*, 710 F. Supp. at 1396; *Larionoff*, *supra*, 533 F.2d at 1180. While the Court believes that the *Larionoff* court's approach is more appropriate, reference to legislative history is not essential here. HUD's justifications, on their face, do not add to plaintiff's characterization of the legislation as an effort to 'fix' the *Rainier* decision and save the government hundreds of millions of dollars. The Court agrees with Judge Rothstein's analysis of those justifications in *Alpine Ridge*, *supra*, at 16-17. The first and second justifications—avoiding excessive rates of return and ensuring a reasonable rate of return—are merely restatements of the money-saving purpose. Since the government bears the burden if the rate of return is excessive, keeping the rate of return down is about saving the government money. Phrasing these rationales in terms of rate of return to the owner rather than expenditure by the government does not change that fact. To the extent that the goal of a "reasonable" rate of return is viewed not as a limit on return but as a protection for the owners, that need is created by § 801 itself. Nor does the third justification have any substance. In the absence of § 801, the application of those studies is a

violation of plaintiffs' contractual rights. The government cannot justify application of the studies on the ground that it seeks to apply them more equitably where the government had no right to apply them at all. The fourth justification, the resolution of the dispute, is little more than bootstrapping. The dispute is about the fact that the contracts have been interpreted adversely to the government by the Ninth Circuit; the government now wants to avoid paying the project owners the amount that the contracts, as so interpreted, require. Again, the government is only concerned with dollars.

The conclusion that these justifications are illusory is consistent with the legislative history of § 801. As Senator Sasser stated, the rationale for § 801 was that:

> [B]y moving quickly to enact this legislation with its Ranier[sic] View 'fix,' we could save the Government hundreds of millions, if not more than a billion dollars. As we all know, at a time when budget dollars for housing are at a premium, we can scarcely afford to spend $1 billion to correct past HUD errors in the administration of its programs.

135 Cong. Rec. S16607 (daily ed. Nov. 21, 1989) (statement of Senator Sasser).

The Court recognizes that the result it reaches is contrary to the general approach that has been taken under the Due Process Clause as applied to economic legislation, but this is not ordinary economic legislation. It is, rather, legislation that deprives private individuals of vested contractual rights against the government, without serving some regulatory or social purpose beyond saving money. The government

may not renege on its obligations simply because, in retrospect, it finds those obligations too expensive.

3. *The "Questioning of the Public Debt" Claim*

Plaintiffs' final claim is based upon Section Four of the Fourteenth Amendment, which provides that "[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall be questioned." U.S. Const. amend. XII, § 4. Neither party gives this claim much attention, and there is a dearth of case law interpreting this provision. Since the Court has already concluded that § 801 violates due process, the Court does not reach this issue.

III. *Conclusion*

This Court is bound by the Ninth Circuit's construction of the HAP contracts in *Rainier View*. HUD's failure to calculate the rent adjustments according to the AAAF formula is a breach of those contracts. The Court concludes that § 801 is unconstitutional in that it deprives plaintiffs of their property right to rent adjustments as provided in the HAP contracts without due process. Since § 801 is unconstitutional, it affords no defense to the breach of contract claim.

Therefore, plaintiffs' Motions for Partial Summary Judgment on Counts I and X are granted. Defendants' Motion for Summary Judgment is denied.
Dated: October 31, 1990

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90-0390 MRP (Sx)

ACACIA VILLA, A California General Partnership, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

FINAL JUDGMENT PURSUANT
TO FED. R. CIV. P. 54(b)

[Filed Oct. 31, 1990]

Plaintiffs' motions for partial summary judgment on Counts and I and X of the First Amended Complaint herein having come on for hearing before this Court on September 27, 1990, the Court having granted these motions for the reasons more particularly set forth in the accompanying Memorandum of Decision, plaintiffs having applied to the Court for entry of final judgment on Counts I and X pursuant to Fed. R. Civ. P. 54(b), and the Court having read and considered the entire record on this matter and the arguments of both parties with respect hereto;

NOW, THEREFORE, IT IS HEREBY ORDERED:

(1) The Court finds and determines that there is no just reason for delay in the entry of final judgment on Counts I and X of the First Amended Complaint and that more than one claim for relief is presented in the action; and

(2) The Court hereby directs the Clerk of the Court to enter final judgment forthwith for plaintiffs on Counts I and X of the First Amended Complaint as follows:

(a) Declaring that Plaintiffs' Housing Assistance Payments contracts ("HAP Contracts") with the United States Department of Housing and Urban Development ("HUD") require HUD to determine maximum rents each year by applying the Automatic Annual Adjustment Factor ("AAAF") published in the *Federal Register* and that HUD's use of "comparability studies" to determine maximum rents for plaintiffs' Section 8 projects is a breach of HUD's obligation to determine maximum rents each year according to the AAAFs;

(b) Declaring that Section 801 of the HUD Reform Act of 1989 is null and void because it violates the Constitution of the United States as more particularly discussed in the accompanying Memorandum of decision; and

(c) Declaring that from the date of this Judgment HUD is obligated to pay to plaintiffs future rent increases under plaintiffs' HAP Contracts determined by applying the AAAF to the Contract Rent which would be in force as of the date of the Judgment if HUD had applied the AAAF factors in the past without comparability studies.

DATED: This 31 day of October, 1990.

/s/ Mariana R. Pfalzer
United States District Judge

PRESENTED BY:

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By /s/ Molly Munger
MOLLY MUNGER

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35267

D.C. No. CV-89-01654-BJR

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

and

BITTERROOT MANOR, a limited partnership, ET AL., PLAINTIFFS-INTERVENORS

-vs-

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

No. 91-35573

ALPINE RIDGE GROUP, a partnership; MONROE ASSOCIATES, a limited partnership; BRENTWOOD, a limited partnership; CAMPBELL COURTS ASSOCIATES, a partnership; CHENEY GARDENS LIMITED PARTNERSHIP, a limited partnership, ET AL., PLAINTIFFS-APPELLEES

-vs-

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Urban Development; U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Washington

No. 91-55354

D.C. No. CV-90-0390-MRP

ACACIA VILLA; ALICIA PARK APARTMENTS; AMERIGE VILLA; ANTELOPE VALLEY, ET AL., PLAINTIFFS-APPELLEES

-vs-

JACK KEMP, Sec. HUD; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California

ORDER DENYING REHEARING

[Filed May 29, 1992]

Before: WALLACE, Chief Judge, HUG and
RYMER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX H

TITLE VIII—SECTION 8 RENT ADJUSTMENTS

SEC. 801. ANNUAL ADJUSTMENT FACTORS FOR SECTION 8 RENTS.

(a) EFFECT OF PRIOR COMPARABILITY STUDIES.—

(1) IN GENERAL.—In any case in which, in implementing section 8(c)(2) of the United States Housing Act of 1937—

(A) the use of comparability studies by the Secretary of Housing and Urban Development or the appropriate State agency as an independent limitation on the amount of rental adjustments resulting from the application of an annual adjustment factor under such section has resulted in the reduction of the maximum monthly rent for units covered by the contract or the failure to increase such contract rent to the full amount otherwise permitted under the annual adjustment factor, or

(B) an assistance contract requires a project owner to make a request before becoming eligible for a rent adjustment under the annual adjustment factor and the project owner certifies that such a request was not made because of anticipated negative adjustment to the project rents.

for fiscal year 1980, and annually thereafter until regulations implementing this section take effect, rental adjustments shall be calculated as an amount equal to the annual adjustment factor multiplied by a figure equal to the contract rent

minus the amount of contract rent attributable to debt service. Upon the request of the project owner, the Secretary shall pay to the project owner the amount, if any, by which the total rental adjustment calculated under the preceding sentence exceeds the total adjustments the Secretary or appropriate State agency actually approved, except that solely for purposes of calculating retroactive payments under this subsection, in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment factor multiplied by the full contract rent for each year on or after fiscal year 1980, minus the sum of the rental payments the Secretary or appropriate State agency actually approved for those years. The method provided by this subsection shall be the exclusive method by which retroactive payments, whether or not requested, may be made for projects subject to this subsection for the period from fiscal year 1980 until the regulations issued under subsection (e) take effect. For purposes of this paragraph, "debt service" shall include interest, principal, and mortgage insurance premium if any.

(2) APPLICABILITY.—

(A) IN GENERAL.—Subsection (a) shall apply with respect to any use of comparability studies referred to in such subsection occurring before the effective date of the regulations issued under subsection (e).

(B) FINAL LITIGATION.—Subsection (a) shall not apply to any project with respect to which litigation regarding the authority

of the Secretary to use comparability studies to limit rental adjustments under section 8(c)(2) of the United States Housing Act of 1937 has resulted in a judgment before the effective date of this Act that is final and not appealable (including any settlement agreement).

(b) 3-YEAR PAYMENTS.—The Secretary shall provide the amounts under subsection (a) over the 3-year period beginning on the effective date of the regulations issued under subsection (e). The Secretary shall provide the payments authorized under subsection (a) only to the extent approved in subsequent appropriations Acts. There are authorized to be appropriated such sums as may be necessary for this purpose.

(c) COMPARABILITY STUDIES.—Section 8(c)(2)(C) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(C)) is amended by inserting after the period at the end of the first sentence the following: "In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under sub-

paragraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units."

(d) DETERMINATION OF CONTRACT RENT.—(1) The Secretary shall upon the request of the project owner, make a one-time determination of the contract rent for each project owner referred to in subsection (a). The contract rent shall be the greater of the contract rent—

(A) currently approved by the Secretary under section 8(c)(2) of the United States Housing Act of 1937, or

(B) calculated in accordance with the first sentence of subsection (a)(1).

(2) All adjustments in contract rents under section 8(c)(2) of the United States Housing Act of 1937, including adjustments involving projects referred to in subsection (a), that occur beginning with the first anniversary date of the contract after the regulations issued under subsection (e) take effect

shall be made in accordance with the annual adjustment and comparability provisions of sections 8(c)(2)(A) and 8(c)(2)(C) of such Act, respectively, using the one-time contract rent determination under paragraph (1).

(e) REGULATIONS.—The Secretary shall issue regulations to carry out this section and the amendments made by this section, including the amendments made by subsection (c) with regard to annual adjustment factors and comparability studies. The Secretary shall issue such regulations not later than the expiration of the 180-day period beginning on the date of the enactment of this Act.

(f) REPORT.—Not later than March 1, 1990, the Secretary shall report to the Congress on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents under section 8(c)(2)(C) of the United States Housing Act of 1937 on the basis of any alternative methodologies that are simpler in application than individual project comparability studies.

(g) TECHNICAL AMENDMENT.—The first sentence of section 8(c)(2)(C) of the United States Housing Act of 1937 is amended by inserting ",type," after "quality".

Approved December 15, 1989.

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(2)

Supreme Court, U.S.
FILED
SEP 26 1992
OFFICE OF THE CLERK

No. 92-551

In The

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

vs.

ALPINE RIDGE GROUP, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT ALPINE'S BRIEF IN OPPOSITION

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No. 92-551

In The

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October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

vs.

ALPINE RIDGE GROUP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT ALPINE'S BRIEF IN OPPOSITION

Respondent Alpine respectfully requests that this Court deny HUD's petition for a writ of certiorari.

STATEMENT OF THE CASE

This case is about "Section 8," a once successful HUD program of the 1970's to "privatize" low income housing. Under

that program, HUD induced private developers to sign long-term contracts to build, own, operate and maintain specialized rental housing for the elderly, handicapped, and poor at specific locations selected by HUD. For the developers it was a high risk program to perform a governmental function (housing the poor) with the incentive for profit and the risk of loss.[1]

The trial courts below, and the Ninth Circuit, found that the contracts "are bargained-for agreements for which plaintiffs paid valuable consideration — they built and maintained low income housing in accordance with HUD's requirements."[2] The contracts expressly provide that they are backed by the "full faith and credit" of the United States.[3]

A primary inducement for developers to enter into the contracts was a provision requiring HUD to make "automatic" annual inflation adjustments to the initial rents negotiated with the developers.[4] The "automatic" adjustments were to be based on inflation factors selected by HUD and published in the Federal Register. HUD sold the program on the promise that the rent adjustment process would be open, objective and hassle-free, unlike the subjective and torturous *project-by-project* process of

1. Senate Report No. 93-693, p. 4314 (Feb. 27, 1974).

2. Petition for Certiorari, Appendix E, p.53a.

3. *Ibid* at p. 53a.

4. The tenant pays a portion of the rent and HUD pays the balance. Adjustments in rents do not affect the amount of rent the tenant pays, which is based solely on a percentage of the tenant's income. *See* Comment 24 C.F.R. § 20083 (May 1, 1991).

rent adjustments used in previous low income housing programs.[5]

From 1974 to 1981 the program attracted hundreds of developers and ran smoothly. The initial rents were negotiated between HUD and the developer, and the developer received inflation adjustments based on HUD's published factors. HUD ensured accurate inflation adjustments by monitoring and selecting the factors and geographical areas based on statistical data and local market conditions.

Beginning in 1981, HUD responded to budgetary pressures by attempting to repudiate the rent adjustment method it used to induce the developers to build and operate the housing. Instead of using its published factors, HUD began to selectively cut rents based on a *project-by-project* method it euphemistically called a "comparability study." The comparability method gave local HUD personnel the license to ignore HUD's factors and selectively cut rents based on arbitrary comparisons with the rents charged by non-assisted housing in the geographical area. Untrained HUD clerks performed "comparability studies" without regulations, handbook provisions, or any other standards or guidelines. The process was described by Congress as follows:

> HUD field offices have been making capricious individualized rent reductions . . .

5. The previous low income housing program was the disastrous Section 236 program. It used government insured mortgages and provided for project-by-project rent adjustments by local HUD officials. The adjustments proved to be unpredictable, time-consuming, and often applied selectively and arbitrarily depending on the HUD employee administering the adjustment and the owner's relationship with that employee (*i.e.*, favoritism or retribution). Rejected and delayed rent adjustments resulted in deferred maintenance, cuts in services, vacancies, and defaulted mortgages. Since the mortgages were government insured, the developers simply walked away from troubled projects, leaving HUD to foreclose.

> such reductions and other rent limitations have been made on an ad hoc and arbitrary basis . . .[6]

HUD claimed its comparability studies demonstrated that rents produced by *its own published factors* were "excessive" and should be cut. In fact, the district court in this case described the results of HUD's rent cuts as follows:

> Plaintiffs have demonstrated great hardship. Some plaintiffs have foregone all return on their investment; others have no money for necessary repairs; and still other are now teetering on the brink of foreclosure."[7]

In *Rainier View Associates v. United States,*[8] the Ninth Circuit ruled that HUD elected the factor method of rent adjustment in the contract and could not circumvent that election under the pretext of preventing "excessive" rents. The court held that HUD was required to prevent excessive rents within the framework of the rent adjustment method it wrote into the contract, *i.e.*, by adjusting the factors in geographical areas, just as it had before the budget crisis in 1981 corrupted HUD's original understanding and administration of the program.

HUD represented to the court, and announced to Section 8 owners throughout the Ninth Circuit,[9] that it would acquiesce in the *Rainier View* decision and bring rents to their proper levels. Instead, HUD proceeded to ask Congress for authority to do

---

6. H.R. 100-122, June 2, 1987.

7. *Alpine, et al. v. Kemp,* May 21, 1991.

8. 848 F.2d 988 (9th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989). *See* Appendix A.

9. Petition for Certiorari, Appendix E, p. 42a.

precisely what the Ninth Circuit ruled it could not do; that is, circumvent its contractual election to use the factor method of rent adjustment. HUD inserted a provision (Section 801) in the 1989 HUD reform bill which abrogated the owner's contractual right to factor rent adjustments, retroactively and prospectively.[10]

A. Section 801

On November 22, 1989, Congress passed H.R. 1, entitled "Department of Housing and Urban Development Reform Act of 1989" (the "Bill"). The Bill was signed by the President on December 15, 1989, as Pub. L. No. 101-235, 103 Stat. 1989. It deals with a number of HUD abuses reported in the press during the summer and fall of 1989.

Tacked on at the end of the Bill was Section 801, entitled "annual adjustment factors for Section 8 rents." The essence of Section 801 is that Section 8 owners who had been victimized by HUD's comparability process were to be further victimized. Owners previously affected by HUD's comparability process would be forced to accept 30 cents on the dollar for rents due under their contracts. In addition, Section 801 authorized project-by-project comparability studies in lieu of factor adjustments for all owners, directly contrary to the owners' contract rights. In short, Section 801 permitted HUD to do exactly what the Ninth Circuit held was not permitted under HUD's Section 8 contracts.[11]

---

10. Secretary Kemp introduced the HUD Reform Bill on October 30, 1989. Cong. Rec. H9885 (Nov. 21, 1989). Section 801 of the Bill addressed the *Rainier View* litigation. *See* Cong. Rec. S. 16601 (Nov. 21, 1989).

11. Senator D'Amato, one of the Bill's sponsors, stated: "In addition, the legislation addresses a controversial ruling in the Ninth Circuit relating to the *Rainier View* case." Cong. Rec.S. 16601 (Nov. 21, 1989). Addendum 14.

Section 801 is not a simple tinkering with the rent adjustment process. It strikes at the very heart of the Section 8 contracts. It eviscerates the factor method of rent adjustment which the Ninth Circuit held was required by the contracts. If Section 801 stands, Congress will have unilaterally amended HUD's contracts to permit project-by-project comparability studies as a substitute for the factor method. The change is material. No Section 8 owner would have taken the risks of the program knowing he could be subject to the whims and caprice of the project-by-project comparability process which Section 801 now authorizes.

B. The Purpose Of Section 801

It is clear from the legislative history that the primary purpose of Section 801 was to save money:

> *Senator Sasser* (Chairman Budget Committee):
>
> Mr. President, I would like to enter into a colloquy with the chairman of the Subcommittee on Housing and Urban Affairs to *clarify the intent of the legislation* with respect to Section 801, "annual adjustment factors for Section 8 rent."
>
> At the outset, I would like to offer my congratulations to the chairman for addressing the very complex situation surrounding the *Rainier View* decision. Indeed, by moving quickly to enact this legislation with its *Rainier View* "fix" we could save the Government hundreds of millions, if not more than a billion dollars.

Cong. Rec. S. 16607 (Nov. 21, 1989).

HUD does not dispute the fact that Section 801 substantially impairs plaintiffs' contract rights to factor rent adjustments.[12]

C. The Decision Below

Plaintiffs challenged Section 801 asking: "does congress have the power to abrogate the government's bargained-for financial contracts in order to save money?"

The Ninth Circuit held that Congress did not have such power. It held that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment."[13]

The court pointed out that plaintiffs' contract rights were "supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934) (Lynch) and *Perry v. United States*, 294 U.S. 330 (1935) (Perry)." The court distinguished the "sovereign powers"

---

12. Before the trial court and the Ninth Circuit, HUD conceded this point. *See* Petition for Certiorari, Appendix B, p. 12a, p. 27a. HUD now suggests (fn. 14) that since comparability could theoretically produce the same result as the factor method, Section 801 does not impair a substantive right. Pigs will fly before the two approaches produce the same result.

Since the two approaches are not attempting to do the same thing, the results will never be the same. The factor approach attempts to keep initial contract rents even with the movement of rents in the local market. As explained later in the text, the comparability approach that HUD argues for is an attempt to remeasure (and undo) the initial relationship of contract rents to the market. One is a principled and objective attempt to keep contract rents even with inflation. The other is an attempt to save money by a subjective reanalysis of the rents originally agreed upon.

13. Petition for Certiorari, Appendix A, p. 14a.

doctrine (it does not apply to bargained-for financial contracts), curative legislation cases (which cure faulty interpretations of statutes, not contracts), and HUD's claim that some rational basis for the legislation existed other than to save money.

D. HUD's Version Of This Case

To mask its conduct, HUD puts a "spin" on the Section 8 program, the rent adjustment process, the *Rainier View* case, and Section 801, that at best has fleeting contact with the undisputed facts.[14] Some of HUD's more egregious misstatements are:

1. That the Section 8 new construction program "was designed simply to provide prevailing market rents."[15] That statement is false. It is critical because it permeates HUD's misdescription of the new construction program.[16]

To understand this case, it is necessary to properly understand the basic facts of the Section 8 new construction program. The first basic fact is how the parties arrived at initial contract rents.

Initial rents under the new construction program were not market rents. They were negotiated rents, based on the costs of construction.[17] Initial rents were not market rents for the simple

14. Sworn affidavits of plaintiffs have not been challenged by HUD.

15. Petition for Certiorari, p.19a..

16. HUD confuses the new construction program and the existing housing program. Under the existing housing program, rents are market rents since the housing was built as market housing (not under the Section 8 program) and formerly rented as such. There is no reason, other than HUD red tape, why existing housing should rent for more simply because it is rented to low income tenants.

17. In the case of HUD insured Section 8 projects, costs had to be certified on completion of construction.

reason that there was no comparable renting housing. Indeed, the sole purpose of the new construction program was to produce rental housing that the market had not produced. [18] The market had not produced the desired rental housing because it was not good economics.

HUD regulations required that initial rents not exceed 120% of what it termed Fair Market Rents.[19] That term was not the same as "market rents." It was defined by regulation as those rents "required to be paid in order to obtain privately developed and owned newly constructed rental housing . . . ."[20]

Since newly constructed rental housing of similar design and amenities did not exist at the locations specified by HUD, it was unrealistic for HUD to come up with Fair Market Rents based on anything other than costs. In addition, HUD's special construction requirements, and Davis Bacon wage rates, increased the developer's costs by close to 50%, necessitating higher Fair Market Rents. As a result, Fair Market Rents, and the companion requirement that rents be "reasonable,"[21] were interpreted by HUD as justifying the rents necessary to make projects financially feasible. Otherwise, no projects would have been developed.

As an example,[22] in 1979 HUD advertised for proposals to

18. HUD regulations provided that "New construction projects shall be permitted only where . . . HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing . . . [to] meet the needs of eligible families." 24 C.F.R. § 880.103 (April 29, 1975).

19. HUD also "trended" rents to the completion of construction.

20. 24 C.F.R. § 880.102 (April 29, 1975).

21. 24 C.F.R.§ 880.108 (April 29, 1975).

22. Taken from the record in *Rainier View*.

build housing for the elderly in Puyallup, Washington, a town of less than 30,000. Retirement housing already existed in Puyallup, but it rented for $800 to $900 a month, without meals. That was far too much for a senior citizen trying to live on a $600 monthly social security check. As a result, many of Puyallup's elderly lived in substandard housing. It was not a group that could afford to pay for decent housing close to transportation and medical and community services.

In response to HUD's invitation, Ray Dally, a local builder, submitted a proposal. His proposal was to build 25 one bedroom apartments in a three-story, brick, elevatored building. It would have a mechanical core, elevator machinery room, elevator shaft, elevator, elevator lobbies on each floor, extra wide interior hallways and stairways with handrails down both sides of the stairs and halls, social hall, handicapped restrooms and an entry security system which was remote controlled by each individual resident from their own apartment. Each apartment had an emergency call light, bathroom grab bars, smoke detectors and automatic fire alarms. The project was near downtown, on expensive land, close to transportation, medical and community services. With a view of Mt. Rainier, it was to be named "Rainier View."

Dally's proposal was accepted. At that point, Dally and HUD agreed by contract that the initial rents for an apartment would be $315 a month. The contract was pledged by Dally to a local bank to secure financing for the project. From the viewpoint of Dally and his bank, the contract rent of $315 was required to justify Dally's high cost of building and financing a specialized building under HUD regulations. In addition, Dally would be operating a difficult social program based on HUD's promise that he would be paid for doing the government's job.

The rent of $315 a month was also agreeable to HUD, even though recently constructed one bedroom apartments in Puyallup rented for under $200 a month. Nonetheless, HUD internally determined that the Dally rents were "reasonable" in light of HUD's special requirements and the uniqueness of the project. There would be nothing like Rainier View in the City of Puyallup, except for retirement housing which rented for two to three times the Rainier View rent. Certainly the wood frame walk-up apartments in the area which rented for under $200 were not comparable.

In any event HUD *agreed* to the original rents. In doing so, HUD interpreted its authority under the Act to justify the rents which were necessary to make the project financially feasible and induce Dally to build. In no sense were those rents "market" rents.

2. HUD's second misstatement is that HUD would "conduct appraisals . . . as a cap to increases produced under the adjustment factors,"[23] That statement is false. It is designed to make an irrational process for *cutting* (not capping) rents by telephone surveys (not appraisals) appear as a principled process to carry out a congressional mandate. In fact, it is a process calculated by HUD to undermine its original agreement on rents.[24] The fact is also

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23. Petition for Certiorari, p. 6

24. In directions to its offices processing retroactive rent payments under the law at issue in this case, HUD stated:

> "Before calculating the amount of any retroactive payment, the PHA, if directed by HUD, will review whether rents were excessive when initially set." 56 Fed. Reg. 20086 (1991).

(Cont'd)

basic to a proper understanding of this case.

Not only did HUD agree on the initial rents, it agreed that the *relationship* of the initial rents to the market would be preserved. For example, Ray Dally's original rents were $315 a month because of the uniqueness of the Rainier View project. At the same time, new walk-up apartments in the area rented for $200 a month. Ten years later if the $200 rent had increased by 50% to $300, Dally's $315 rent was to have moved 50% to $472.50. Only in that way could Dally be assured of getting a return on his investment comparable to what he would have received had HUD not induced him to enter the Section 8 program. To guarantee Dally that he would get inflation adjustments on a regular basis while preserving the intitial relationship of his rents to the market, his contract with HUD provided:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
>
> (2) On each anniversary date of the contract, the Contract Rents shall be adjusted by

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(Cont'd)

This direction reveals HUD's mind set. First, rents were not "set" by HUD, they were agreed upon between HUD and the developer. Second, HUD has no authority to revisit its original agreement on rents. The developer relied on those rents in making his decision to proceed with the project. Both parties must live with their bargain.

> applying the applicable automatic annual adjustment factor most recently published by the government.
>
> * * *
>
> *Overall Limitation.*
>
> Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; *provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.*

The two provisions (automatic annual adjustments and overall limitation) must be read together and harmonized. Taken alone, the provision for automatic annual adjustments gives little guide to the basis for selecting factors.[25] The overall limitation supplies that basis. It directs that the factors selected by HUD shall maintain, without increasing or decreasing, the difference between the initial rents and market rents. In other words, the factors should measure the *movement* in market rents and adjust rents accordingly. That is exactly how HUD interpreted and administered the rent adjustment process until 1981.

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25. In 1983 HUD seized on that fact in an attempt to justify basing factors on changes in operating costs, rather than changes in market rents. The attempt was dropped after prompting the following remarks from Chairman Gonzales of the House Subcommittee on Housing:

(Cont'd)

To implement its understanding of the two provisions, HUD annually selected Automatic Annual Adjustment Factors ("AAAFs") based on the *movement* of rents in various georgraphic areas, and published those factors in the Federal Register. The factors were percentage figures, required by regulation to be applied against current rents to produce the new rents. For example, if the rental movement factor is 5% and the current rents are $350 per month, the adjusted rents for the following year would be 105% of $350, or $367 per month.

HUD'S understanding of the program was described in the *Rainer View* case by a number of HUD officials. Lynn Stowell, HUD Director of Housing in Seattle, testified:

> Q. The automatic adjustment process, the way you understand it, was basically an inflation hedge, was it not?
>
> A. Yes.
>
> Q. And that was the way it was explained to developers and lenders?
>
> A. Yes.

(Cont'd)

I recognize the Department is undoubtedly being directed to stick by its guns through the orders of the Office of Management and Budget. But it is a sorry day when any agency of the government, in the name of economy, stands ready to corrupt contracts, vitiate and violate the law, and generally operate in a style more appropriate to a small time dictatorship." *Section 8 Rent Adjustments, Elderly Housing and Other Assisted Housing Issues: Hearing Before the Subcommittee on Housing and Community Development of the House*

> Q. I am not trying to put words in your mouth, but so that if market rents went up 15%, you would expect contract rents to go up 15%?
>
> A. Yes.[26]

Ray Bradley, Seattle HUD Director of Development, testified:

> Q. Wasn't it your understanding then that if the market was at this level and contract rents were, say, at this level that the idea of the adjustment was that the contract rents would rise with the market rents, is that correct?
>
> A. Yes, that was my understanding.
>
> Q. If market rents went up 10%, your contract rents went up the same 10%.
>
> A. The same gap would be maintained.[27]

The program ran smoothly from 1974 to 1981. Each year, HUD designated the geographical areas and selected the factors based on the overall limitation, and adjusted rents accordingly.[28]

26. *See Rainier View* case, excerpts of record 64.

27. *Ibid.*

28. The process can be traced through HUD regulations, handbooks, and detailed written methodologies. It started with factors developed by the economic analysis arm of HUD, which develops factors for cities and other areas by using rental market information derived from a number of data sources and market analysis. *See* Methodologies, Appendix B and C, *infra*, 8a-24a. Handbook provisions directed local offices to revise the factors if they were either too high or too low. As all of this makes clear, the factor process has built in safeguards against the "anomalous" results HUD pretends to fear.

The "same gap" was maintained.

In 1981, as inflation drove Section 8 rents higher and housing budgets became smaller, some HUD offices took it upon themselves to ignore the automatic annual rent adjustment process. Instead of comparing the movement of rents and translating it into factors, certain offices started to recompare projects, invariably concluding that the Section 8 rents were "excessive." Instead of a system which maintained a base (initial rents) and moved upward or downward according to market conditions, HUD attempted to set a new base. The purpose of the process changed from protecting the value of the original rents to undercutting that value.

To the extent that chaos can be called process, the process began with untrained HUD clerks (not appraisers) calling around to see if they could find any "comparable" market rents that were lower than those of the Section 8 project arbitrarily selected for review. Of course, they always did, even if they had to "compare" a downtown highrise Section 8 project for the elderly with a dilapidated walk-up apartment on the edge of town.

By "recomparing" projects, HUD was undermining the original relationship between the Section 8 project and the market, in direct violation of its written promise. It was as if original rents had never been agreed upon. Everything was starting from "ground zero," even though HUD had agreed on the original relationship between project rents and the market in an effort to induce the developer to execute a contract.

Invariably, the new process resulted in rent adjustments that were lower than those based on the *movement* of rents. In many cases the new process was used not only to deny increases, but to substantially *cut* existing rents, regardless of the impact on the owner.

All of this was done without regulations, handbook

provisions, or any other standards or guidelines. The reports of trained appraisers challenging HUD's "comparability" studies were ignored. If hearings were allowed, neither the owner nor his representative were allowed to ask questions. Normally the HUD official who cut the rents made the determination whether or not he would undo his own handiwork. To say that the process was bizarre unduly dignifies it.

When finally challenged, HUD attempted to justify its rent cutting by reference to the "overall limitation" clause. It now saw that clause not as a limitation on the selection and modification of the factors, but as an *independent* rent adjustment method not mentioned in the contract. HUD had not yet invented its two-tiered or "capping" argument, and of course that argument would be inadequate to explain *cutting* existing rents.[29]

To give an illustration, if Dally's rents should have gone to $472.50 based on market movement, they were instead *reduced* to $375 by "comparing" his well located brick high rise apartments with two story wooden walk up apartments on the edge of town. The effect was to destroy the original relationship of Dally's apartments to the market. Worse yet, the objective rent system which Dally had bargained for was now replaced by a subjective system vulnerable to bureaucratic whims of favoritism or retribution. Instead of being able to rely on uniform published

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29. In 1987 Congress stated that it never intended the process to *cut* rents unless deflation occurred and HUD published a negative factor. H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987):

> When it enacted the Section 8 program, the Congress intended that rents for project based assisted projects would be reduced only if the published Automatic Annual Adjustment Factor ("AAAF") was negative. . . .

factors open to public scrutiny, evenly applied to all, Dally was subjected to back room manipulations of rent which he originally had been assured went out with the discredited Section 236 program.

The Ninth Circuit in *Rainier View* held that HUD's new "system" made a mockery of its contract election of a factor method of rent adjustment.

3. HUD's third major misstatement is that the *Rainier View* and *Alpine* decisions "invalidate a key provision in a substantial federal program designed to provide housing for low income tenants . . . and threaten to inflict widespread harm on a major social welfare program."[30] That statement is also false. Its hysterical tone is again intended to mask HUD's attempts during the 1980's to euthanatize a successful program of the 1970's to privatize low income housing.

More to the point, *Rainier View* did not tell HUD to abandon its mandate. It simply held that the mandate must be carried out within the framework of HUD's contractual election of a factor method of rent adjustment. Although *Rainier View* is based on an analysis of the contract and the statute, the same result would be reached using a straight analysis of the contract and applying ordinary principles of contract interpretation.[31]

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30. Petition for Certiorari, p. 11.

31. It is HUD, not plaintiffs, which has a record of strained interpretations. For example, in 1988 a congressional subcommittee dealing with HUD's interpretation of a 1987 congressional mandate not to cut Section 8 rents, said that "nothing could be more convoluted and tortuous than HUD's interpretation of . . . the 1987 Act." In *Rainier View*, the trial court accused HUD of conjuring up "linguistic loopholes which the government has sought to exploit . . ." *See* Petition for Certiorari in *Rainier View* at p. 54a.

Rainier View does not invalidate a contract provision. The decision validates a contract provision for rent adjustments, the parties understanding of that provision, and HUD's practical application of that provision for seven years. The decision does not do widespread harm to a program, it supports that program. The decision makes it safer to do business with HUD, which is good for low income housing. The decision validates an experiment in privatization, which Secretary Kemp now claims is the key to housing the poor. In short, *Rainier View* not only recognized but gave full effect to the overall limitation.

As it did from 1974 to 1981, HUD can still make as many studies of rent movement as it wants in any area it wants. But the study is to measure market *movement*, which then must be translated to published factors to protect the openness and uniformity which is imperative to a principled system. HUD is unable to show why the system which operated effectively for years will not produce an accurate measurement of market *movement*.[32] The answer is that HUD does not want to measure market *movement*. HUD's real purpose is to undermine the original relationship of rents to market, which it agreed upon when the developers executed contracts and pledged those contracts as security for financing.

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32. HUD has been using the factor method of rent adjustment since 1989, even though it was given authority under Section 801 to do project-by-project comparability if it first published regulations. If the factor method of rent adjustment was such a drain on the treasury, surely HUD would have implemented comparability under Section 801 long ago. It was not prohibited from doing so, except for the few plaintiffs in this case.

HUD has not published regulations for comparability (even though required to do so by June 15, 1990) for one obvious reason. Publication would expose the fact that HUD is not interested in accurately measuring market movement of rents. Its only interest is in undermining the original relationship of rents to market.

REASONS FOR DENYING THE WRIT

Although the Ninth Circuit's decision in *Alpine* needs no additional gloss, a few observations are in order.

1. In *Alpine*, the Ninth Circuit held that plaintiffs have bargained-for contract rights to factor based rent adjustments. Those rights are supported by independent consideration and are therefore vested under *Lynch* and *Perry*. HUD offers no basis to distinguish *Lynch* and *Perry*, other than to repeat its claim that plaintiffs do not have contract rights to factor based rent adjustments.

2. HUD's attempt to put Section 801 in the category of "curative" legislation is patently wrong. Unliquidated claims, not based on contract, can of course be resolved by Congress. The cases cited by HUD support that proposition, but nothing more.[33] HUD fails to reveal how those cases support Congress' abrogation of contract rights, whether or not under the guise of "curative legislation."

Here, plaintiffs' claims are supported by "investment-backed expectations." Plaintiffs invested their money in special use buildings in return for HUD's promise of hassle-free rent adjustments. Congress cannot take away plaintiffs' rights under the guise of curative legislation.

3. HUD equates the power to amend a statute with the power

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33. *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989) (retroactive application of Act precluding anti-trust damages permitted as to unliquidated claims — did not involve vested contract rights); *Graham and Foster v. Goodcell*, 282 U.S. 409, 426-30 (1931) (a defect in the administration of the Internal Revenue Code can be cured by retroactive legislation — did not involve vested contract rights).

to amend existing contracts. It cites the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) for the doctrine of "sovereign power" to repudiate its contract obligations. As the Ninth Circuit pointed out, *Bowen* involved "benefits, gratuitously conferred by statute." That is a far cry from the "bargained-for contract rights" involved in this case.

4. HUD claims some rational purpose for Section 801 other than to save money. As the Ninth Circuit pointed out, settling a dispute which the government itself created is not a rational basis for the government repudiating its own contracts. Since HUD was "unable to present any argument explaining Section 801 other than Congress' attempt to save money", the case falls within *Lynch* and *Perry*.

CONCLUSION

The Ninth Circuit decision is clearly correct. HUD offers no legitimate grounds for reversing that decision. The petition should be denied.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED JUNE 6, 1988

RAINIER VIEW ASSOCIATES, a Washington limited partnership; Kurtis R. Mayer and Pamela Mayer, dba/ Mayer Built Homes,

Plaintiffs-Appellants,

v.

UNITED STATES of America, acting Through the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-Appellee.

No. 86-3685.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted May 5, 1987.
Submission Vacated June 1, 1987.
Resubmitted March 7, 1988.
Decided June 6, 1988.

Warren J. Daheim, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Seattle, Wash., for plaintiffs-appellants.

Mack A. Player, Dept. of Justice, Civ. Div., Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Western

Appendix A

District of Washington.

Before FLETCHER, BOOCHEVER and NORRIS, Circuit Judges.

PER CURIAM:

In this action for declaratory relief, we consider a question of contract interpretation concerning the method by which the United States Department of Housing and Urban Development ("HUD") may alter its method of calculating annual rent adjustments for government-assisted housing projects. The district court granted summary judgment in favor of the United States and against Rainier View Associates (Rainier), a developer and owner of Section 8 housing. We reverse.

I

Around 1974; pursuant to the enactment of Section 8 of the United States Housing Act of 1987, as amended, 42 U.S.C. § 1487f, HUD implemented a program to encourage the private sector to build rental housing for low-income people. HUD solicited private developers to submit bids to construct specialized housing at specific locations. Successful bidders were awarded Housing Assistance Payment (HAP) contracts, either directly or through local public housing agencies as the contract administrators. Under the HAP contract, the developer/owner collects a portion of the contract rent directly from the tenant, while the remainder is paid to the owner by HUD through the contract administrator.

Section 8(c)(2)(A) requires that the HAP contract provide for periodic adjustment of the maximum monthly rent (and thus of HUD's contribution) "to reflect changes in the fair market rentals

Appendix A

established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A). Section 8(c)(2)(C) places a limitation on the permissible adjustments so that they "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. § 1437f(c)(2)(C).

Section 1.9 of the HAP contract at issue in this case contains provisions designed to carry out the mandates of section 8(c)(2):

* * * * *

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . . .

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

* * * * *

Appendix A

d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

On April 9, 1980, Rainier executed a HAP contract for a term of twenty years with the Housing Authority of the City of Bremerton (Bremerton). In 1981 and 1982, Bremerton granted Rainier annual rent adjustments for its Section 8 housing project based upon HUD's published Automatic Annual Adjustment Factors (AAAFs). However, in 1988, Bremerton refused to grant Rainier the annual adjustment that would have resulted from the application of the AAAFs published by HUD in the *Federal Register* on January 20, 1988. Instead, Bremerton insisted that Rainier conduct a rent study of the housing in the project's vicinity in order to justify any adjustment in the maximum rent allowances. Rainier refused and commenced this action in the district court, seeking a declaratory judgment that under the HAP contract, it was entitled to an automatic annual adjustment based on the latest published AAAFs.

The district court granted summary judgment for HUD, ruling that as a matter of law the HAP contract unambiguously permits HUD (in this case through its agent, Bremerton) to withhold the annual rent adjustment outlined in section 1.9b when such an adjustment would violate the overall limitations provision in Section 1.9d. Rainier appealed.

Appendix A

II

A grant of summary judgment is reviewable *de novo*. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). Federal law controls when interpreting a government contract. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 227 (1983). The interpretation of a contract presents a mixed question of law and fact. When, as here, the district court's decision is based on analysis of the contract language, the decision is reviewed de novo. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985).

Section 8(c)(2)(A) allows adjustments based either on market surveys, "or, if the Secretary determines, on the basis of a reasonable formula." Rainier contends that in Section 1.9b of the HAP contract HUD *elected* to rely exclusively on the AAAF formula process, instead of on an individualized "market survey" method. By switching to an individualized "market survey" method, Rainier argues, HUD reneged on its obligation. Rainier explains that the "overall limitation" in Section 1.9d is a limitation on HUD's calculation of the AAAFs. Accordingly to Rainier, the clause may *not* be construed as providing HUD with an independent basis for refusing to apply the published AAAFs. Rainier argues that by invoking the "overall limitation" provision as an independent basis for adjusting the maximum allowable rent, even though the latest published AAAFs show that a greater adjustment is indicated, HUD is seeking to nullify its election.

HUD counters that Section 1.9d of the HAP contract authorizes the government to limit adjustments that would occur through the use of the AAAF formula when use of that formula would result in a material difference between the rents charged for assisted and comparable unassisted housing. HUD argues that the language of Section 1.9d, which provides, "Notwithstanding any

other provisions of this contract, adjustments as provided in this Section shall not result in material differences between rents charged for assisted and comparable unassisted housing units . . . , authorizes HUD to override the formula process for determining rent adjustments.

HUD misconstrues the role of the overall limitation. The overall limitation provision in section 1.9d, consistent with its statutory analog, Section 8(c)(2)(C), is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments. Under the statute, HUD could choose either a market survey method (described in the first clause of Section 8(c)(2)(A)) *or* a formula method (described in the second clause of Section 8(c)(2)(A)). In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity. It would make all rent adjustments depend on the market survey method.

Not only is HUD's interpretation of Section 1.9d of the contract foreclosed by the contract language, it is inconsistent with the role of the overall limitation provision described in the regulations. 24 C.F.R. § 888.204 (1987) provides that

> "[i]f the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance . . . , in the area for

> which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area."

Thus, HUD's own regulations interpret the overall limitation provision in the statute the same way we interpret the overall limitation provision in the contract — as permitting adjustment of the AAAFs, not abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents.

In sum, the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another. That is clear from the contract language, and is consistent with the statutory language and HUD's own regulations interpreting the statute. We thus hold that the contract unambiguously support Rainier's interpretation. Accordingly, the district court erred in denying Rainier's motion for summary judgment and in granting summary judgment in favor of HUD.

Rainier's request for its attorneys' fees on appeal pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), should be considered by the district court.

The judgment of the district court is

REVERSED.

APPENDIX B — METHODOLOGIES

Methodology Used to Develop Automatic Annual Adjustment Factors for the Section 8 Housing Assistance Payments Program Effective November 8, 1980

Section 8(c)(2)(A) of the United States Housing Act of 1937, as amended, specifies that an assistance contract made pursuant to Section 8 shall provide for adjustments annually or more frequently in the maximum monthly rents to reflect changes in the fair market rentals, and further specifies, if the Secretary determines, that these adjustments be made on the basis of a reasonable formula. Subpart B of Part 888 of the Code of Federal Regulations established general guidance in regard to the development and use of Automatic Annual Adjustment Factors (AAFs), the manner of publication, and the revision of factors for a particular area by HUD Field offices.

Pursuant to the regulations, the Headquarters Economic and Market Analysis Division produces Annual Adjustment Factors for selected (currently 34) Standard Metropolitan Statistical Areas (SMSAs) and the 4 Census Regions based on rent and utility inflation factors developed from the "Rent, residential" and "Fuel and Other Utilities" components of the Consumer Price Index for All Urban Consumers (CPI(U)). Normally, these inflation factors are based on changes in the CPI rent and utility indexes for the most recent 12 month period, but they may, for selected areas, be based on changes in the CPI indexes for other time periods or be adjusted to reflect rental market information derived from other data sources or market analysis.

A single factor is developed for use in adjusting Contract Rents (excluding utilities), and a matrix of 105 separate factors, reflecting differences for various rent ranges and bedroom sizes, is developed for adjustment of Contract Rents including all utilities (Gross Rents). The following is an example of the format used to publish the AAFs in the Federal Register:

Appendix B

SECTION 8 HOUSING ASSISTANCE PAYMENT PROGRAMS ANNUAL ADJUSTMENT FACTORS SMSA: ANAHEIM-SANTA ANA-GARDEN GROVE, CA

MONTHLY GROSS RENT	0 BEDROOMS	1 BEDROOM	2 BEDROOMS	3 BEDROOMS	4+ BEDROOMS
UNDER $125	1.133	1.143	1.157	1.174	1.185
125-149	1.130	1.138	1.150	1.163	1.172
150-174	1.128	1.135	1.144	1.156	1.164
175-199	1.126	1.132	1.141	1.151	1.157
200-224	1.125	1.130	1.138	1.146	1.152
225-249	1.124	1.128	1.135	1.142	1.149
250-274	1.123	1.128	1.134	1.141	1.146
275-299	1.123	1.127	1.132	1.139	1.143
300-324	1.122	1.126	1.131	1.137	1.141
325-249	1.122	1.125	1.130	1.135	1.139
350-374	1.121	1.124	1.129	1.134	1.137
375-399	1.121	1.124	1.128	1.133	1.136
400-424	1.121	1.123	1.127	1.132	1.135
425-449	1.120	1.123	1.127	1.131	1.134
450-474	1.120	1.123	1.126	1.130	1.133
475-499	1.120	1.122	1.125	1.129	1.132
500-524	1.120	1.122	1.125	1.129	1.131
525-549	1.120	1.122	1.125	1.128	1.130
550-574	1.119	1.121	1.124	1.128	1.130
575-599	1.119	1.121	1.124	1.127	1.129
600 +	1.119	1.121	1.124	1.127	1.129

ANNUAL ADJUSTMENT FACTOR FOR CONTRACT RENT (EXCLUDING UTILITIES) is 1.116

Development of AAFs for Contract Rents (excluding utilities)

With two exceptions, the AAFs for Contract Rents (excluding utilities) effective November 8, 1980 were developed on the basis of rent inflation factors derived from the residential rent component of the CPI for the 12-month period from April or May 1979 to April or May 1980, depending on the month designated for data collection in each market area.

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The inflation factor applicable to the San Francisco SMSA was derived from the trend in the CPI rent index between August 1979 and April 1980, and the inflation factor for the Anchorage SMSA was derived from the CPI trend between January 1980 and May 1980. The use of the different time periods for calculation of the inflation factors for the San Francisco and Anchorage SMSAs was adopted to avoid questionable short-term fluctuations in the CPI rent indexes for those areas.

A table indicating the rent inflation factors applicable to the 4 Census Regions and the 34 SMSAs for which CPI data currently is available is attached.

The following example illustrates the development of the AAFs for Contract Rents (excluding utilities) for the Anaheim-Santa Ana-Garden Grove SMSA, which as indicated at the bottom of the preceding table of Annual Adjustment Factors has been established at 1.116:

$$\frac{\text{CPI rent index May 1980}}{\text{CPI rent index May 1979}}\ \frac{207.6}{186.0} = 1.116$$

Development of AAFs for Contract Rents Including Utilities (Gross Rents)

As indicated, a matrix of 105 separate factors, reflecting differences for various rent ranges and bedroom sizes, is developed for adjustment of Gross Rents.

The AAFs for Gross Rents effective November 8, 1980 were developed on the basis of rent and utility inflation factors derived from the residential rent, and fuel and utilities components of the CPI. The rent inflation factors are the same as those used for the development of the AAFs for Contract Rents (excluding utilities). Estimates of utility costs by bedroom size established as part of the Fair Market Rent schedules for Section 8 Existing Housing in 1979, and two sets of utility inflation factors were used to develop the utility portion of the AAFs for Gross Rents.

The most recent annual utility inflation factors reflect changes in the fuel and utilities component of the CPI for the 12-month period from April or May 1979 to April or May 1980. The utility inflation

Appendix B

factors for the previous year generally reflect changes in the utilities component of the CPI between April or May of 1978 and 1979; but, for some areas, they may reflect changes for other time periods or adjustments based on other data or market analysis.

The estimates of utility costs by bedroom size for 1979, as determined from the Annual Housing Survey (AHS) national sample for 1977 updated to 1979 by use of the CPI national index for utilities, are as follows:

Number of Bedrooms	0	1	2	3	4
Fuel and Utility Costs	$20	31	47	66	79

A table indicating the rent and utility inflation factors applicable to the 4 Census Regions and 34 SMSAs is attached.

The following example illustrates the development of one of the 105 factors in the matrix of adjustment factors for Gross Rents applicable to the Anaheim-Santa Ana-Garden Grove SMSA (Monthly Gross Rent range of $225-249 and 2 Bedroom Unit):

The objective is to develop Annual Adjustment Factors reflecting differences for various rent ranges and bedroom sizes.

Step 1. Calculate the mid-point of the selected Gross Rent range (to be used to represent the Gross Rent for this rent range for 1980):

$$\frac{\$249.99 - 225.00}{2} = \$12.50 \qquad \$225.00 + 12.50 = \$237.50$$

Step 2. Update the utility cost for a 2 Bedroom Unit from 1979 to 1980 using the calculated utility inflation factor from the attached table:

$47.00 × 1.1550 = $54.29 Utility component 1980

Step 3. Use the utility cost estimate for 1980 to calculate the rent component of the mid-point rent as of 1980:

$237.50 – 54.29 = $183.21 Rent component 1980

Step 4. Update the utility cost for a 2 Bedroom Unit from 1980 to 1981 using the appropriate utility inflation factor from the attached table:

$54.29 × 1.2010 = $65.20 Utility component 1981

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Step 5. Update the rent component of the mid-point rent from 1980 to 1981 using the rent inflation factor from the attached table:

$183.21 × 1.1160 = $204.46 Rent component 1981

Step 6. Add the rent and utility components calculated in steps 4 and 5 to obtain a mid-point rent for 1981:

$65.20 + 204.46 = $269.66 Mid-point rent 1981

Step 7. Calculate the AAF for the 2 Bedroom Unit in the $225-249 rent range by dividing the mid-point rent for 1981 by the mid-point rent for 1980:

$$\frac{\$269.66}{237.50} = 1.135 \text{ AAF for Gross Rent}$$

Checking the table of AAFs for Gross Rents for the Anaheim-Santa Ana-Garden Grove SMSA reveals that the AAF for the 2 Bedroom Unit in the $225-249 rent range is given as 1.135 as illustrated in the above example.

Note: See attached table for Rent and Utility Inflation Factors.

Appendix B

RENT AND UTILITY INFLATION FACTORS
Used to Develop Automatic Annual Adjustment Factors
Effective November 8, 1980

SMSA CODE	CENSUS REGION OR SMSA	1980-1981 RENT FACTORS	1979-1980 UTILITY FACTORS	1980-1981* UTILITY FACTORS
—	NORTHEAST	1.0740	1.2247	1.2500
—	NORTH CENTRAL	1.0790	1.1425	1.1550
—	SOUTH	1.0920	1.1266	1.1430
—	WEST	1.1060	1.1243	1.2070
360	ANAHEIM-SANTA ANA-GARDEN GROVE	1.1160	1.1550	1.2010
380	ANCHORAGE	1.0030	1.0911	1.0900
520	ATLANTA	1.0720	1.0994	1.1160
720	BALTIMORE	1.0670	1.0583	1.1810
1120	BOSTON	1.0780	1.3229	1.2840
1280	BUFFALO	1.0540	1.1782	1.2420
1600	CHICAGO	1.0900	1.1328	1.1630
1640	CINCINNATI	1.1040	1.0860	1.1370
1680	CLEVELAND	1.0690	1.1789	1.1500
1920	DALLAS-FORT WORTH	1.0960	1.0560	1.0390
2080	DENVER-BOULDER	1.0970	1.1435	1.1630
2160	DETROIT	1.1000	1.1508	1.1340
2960	GARY-HAMMON-EAST CHICAGO	1.0900	1.1328	1.1630
3320	HONOLULU	1.1060	1.0398	1.1440
3360	HOUSTON	1.0600	1.2063	1.1530
3760	KANSAS CITY	1.0630	1.1529	1.0410
4480	LOS ANGELES-LONG BEACH	1.1160	1.1550	1.2010
5000	MIAMI	1.1220	1.0936	1.1480
5080	MILWAUKEE	1.0800	1.1857	1.2270
5120	MINNEAPOLIS-ST. PAUL	1.0960	1.0700	1.1260
5600	NEW YORK	1.0660	1.1997	1.2100
5640	NEWARK	1.0660	1.1997	1.2100
5745	NORTHEAST PENNSYLVANIA	1.0580	1.1704	1.1890
6000	OXNARD-SIMI VALLEY-VENTURA	1.1160	1.1550	1.2010
6040	PATTERSON-CLIFTON-PASSAIC	1.0660	1.1997	1.2100
6160	PHILADELPHIA	1.0610	1.2368	1.2830
6280	PITTSBURGH	1.0680	1.1110	1.1280
6440	PORTLAND	1.0730	1.2383	1.2940
6780	RIVERSIDE-SAN BERNARDINO	1.1160	1.1550	1.2010
7040	ST. LOUIS	1.1530	1.1204	1.0670
7320	SAN DIEGO	1.0900	1.1508	1.2700
7360	SAN FRANCISCO	1.0970	1.1275	1.1690
7600	SEATTLE-EVERETT	1.2070	1.2132	1.2840
8840	WASHINGTON	1.0860	1.1033	1.1460

* Dates indicated above for rent and utility factors apply to the period of use.
See the text of the AAF Methodology for references to data sources and dates.

APPENDIX C — METHODOLOGIES

Methodology Used to Develop Automatic Annual Adjustment Factors for the Section 8 Housing Assistance Payments Program Effective November 8, 1981

Section 8(c)(2)(A) of the United States Housing Act of 1937, as amended, specifies that an assistance contract made pursuant to Section 8 shall provide for adjustments annually or more frequently in the maximum monthly rents to reflect changes in the fair market rentals. This Section further specifies, if the Secretary determines, that these adjustments can be made on the basis of a reasonable formula. Subpart B of Part 888 of the Code of Federal Regulations establishes general guidance in regard to the development and use of Automatic Annual Adjustment Factors (AAFs), the manner of publication, and the revision of factors for a particular area by HUD Field Offices.

The methodology used by the Headquarters Economic and Market Analysis Division to develop the November 8, 1981 AAFs is based on a formula using the "Rent, residential" and "Fuel and Other Utilities" components of the Consumer Price Index for All Urban Consumers (CPI(U)) as of June 1981, and data from the 1978 and 1979 Annual Housing Surveys (AHS) updated to 1982. AAFs are developed for 37 Standard Metropolitan Statistical Areas (SMSAs) and the four Census Regions. Two sets of factors are developed; one for Contract Rents Including Highest Cost Utility, and one for Contract Rents Excluding Highest Cost Utility. A matrix of 50 separate factors, reflecting variations by rent ranges and bedroom sizes, is developed for each set of factors. The step-by-step procedures and the data used to develop the adjustments factors are as follows:

(1) Calculation of the increases in the Rent and Utilities components of the CPI for the most recent twelve-month period

(2) Calculation of a Shelter Rent increase factor by adjusting for the units in the CPI Rent Index that include heating costs

(3) Calculation of a single Gross Rent increase factor for each of the 37 SMSAs and the four Census Regions by weighting the Shelter Rent and Utility increases in accordance with National and Census Regional weights derived from 1979 AHS data

(4) Calculation of AAFs for Contract Rents Including Highest Cost Utilities (Gross Rents) that reflect differences for rent ranges and bedroom sizes developed from 1978 and 1979 AHS data

(5) Calculation of AAFs for Contract Rents Excluding Highest Cost Utilities (Shelter Rents) by development of shelter rents for 1982 and 1981, and comparison of the 1982 rents with the 1981 rents

A detailed description of the step-by-step procedures and the data used to develop the Automatic Annual Adjustment Factors for both Gross Rents and Shelter Rents is given in the following paragraphs:

An example of the AAF calculations for the Boston SMSA is given following the description of the Methodology.

(1) *Calculation of Rent and Utility Increase Factors Based on CPI*

Rent and Utility increase factors for the most recent twelve-month period were calculated by dividing the most recent Rent and Utility price index from the CPI by the index for the same month one year earlier as shown in Table A below:

Appendix C

Table A
Rent and Utility Increase Factors Based on Change in CPI

Census Region or SMSA	Survey Month	Rent Index 1980	Rent Index 1981	Increase Factor	Util. Index 1980	Util. Index 1981	Increase Factor
Northwest Census Region	June	117.1	126.3	1.0786	143.2	168.7	1.1781
North Central Census Region	June	119.4	127.7	1.0695	134.2	150.7	1.1230
South Census Region	June	122.4	132.0	1.0784	127.0	144.9	1.1409
West Census Region	June	125.9	138.7	1.1017	141.3	149.1	1.0552
Anaheim-Santa Ana-Garden Grove, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Anchorage, AK	May	157.8	165.9	1.0513	194.7	217.9	1.1192
Atlanta, GA	June	166.6	187.8	1.1273	259.9	276.9	1.0654
Baltimore, MD	May	172.9	187.7	1.0856	266.4	309.1	1.1603
Boston, MA	May	194.4	218.7	1.1250	312.8	380.7	1.2171
Buffalo, NY	June	176.7	184.7	1.0453	346.4	408.6	1.1796
Chicago, IL	June	172.3	183.8	1.0667	253.8	285.0	1.1229
Cincinnati, OH-KY-IN	May	168.9	184.9	1.0947	287.5	318.9	1.1092
Cleveland, OH	June	169.1	178.3	1.0544	279.4	321.5	1.1507
Dallas-Fort Worth, TX	June	188.8	207.9	1.1012	243.6	305.9	1.2557
Denver-Boulder, CO	May	182.9	201.2	1.1001	243.0	276.7	1.1387
Detroit, MI	June	194.3	204.7	1.0535	294.9	335.6	1.1380
Gary-Hammond-East Chicago, IN	June	172.3	183.8	1.0667	253.8	285.0	1.1229
Honolulu, HI	June	205.6	229.1	1.1143	237.6	334.9	1.4095
Houston, TX	June	181.2	196.7	1.0855	317.2	377.2	1.1892
Jersey City, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Kansas City, MO-KS	June	162.4	172.2	1.0603	265.3	299.0	1.1270
Los Angeles-Long Beach, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Miami, FL	May	121.9	141.6	1.1616	119,8	142.9	1.1928
Milwaukee, WI	May	178.4	193.3	1.0835	293.1	339.1	1.1569
Minneapolis-St. Paul, MN-WI	June	195.2	215.0	1.1014	266.9	320.3	1.2001
Nassau-Suffolk, NY	June	200.7	216.0	1.0762	316.5	375.3	1.1858
New Brunswick-Perth Amboy-Sayreville, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
New York, NY	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Newark, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Northeast Pennsylvania, PA	May	217.7	227.4	1.0446	348.0	412.7	1.1859
Oxnard-Simi Valley-Ventura, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
Patterson-Clifton-Passaic, NJ	June	200.7	216.0	1.0762	316.5	375.3	1.1858
Philadelphia, PA-NJ	June	194.1	208.4	1.0737	292.3	345.0	1.1803
Pittsburgh, PA	June	185.9	199.4	1.0726	247.4	272.8	1.1027
Portland, OR-WA	May	200.3	215.7	1.0769	317.3	357.6	1.1270
Riverside-San Bernardino-Ontario, CA	June	212.0	235.2	1.1094	233.9	250.9	1.0727
St. Louis, MO-IL	May	166.1	177.6	1.0692	228.4	245.4	1.0744
San Diego, CA	May	221.2	243.4	1.1004	220.4	259.8	1.1788
San Francisco-Oakland, CA	June	212.8	233.2	1.0959	321.0	309.9	1.0000
Seattle-Everett, WA	May	225.3	240.7	1.0684	264.5	298.0	1.1267
Washington, DC-MD-VA	May	194.7	213.4	1.0960	252.5	287.6	1.1390

Appendix C

(2) *Calculation of a Shelter Rent Increase Factor*

(a) The residential rent component of the CPI is based on a sample of about 18,000 rental units. The rental data for some of the units in each of the areas surveyed includes the cost of heating. To calculate a Shelter Rent increase factor for each of the 37 SMSAs and the four Census Regions for which the CPI data was available, it was necessary to eliminate the cost of heating from the Rent component of the CPI, and this was accomplished by the use of the following formula:

$$I = A(CR + DU) + B(R)$$

(Solve for R to find Shelter Rent increase)

I = CPI residential rent increase factor

A = Percentage of rental units in the CPI sample that included the cost of heating

B = Percentage of rental units in the CPI sample that did not include the cost of heating

C = The ratio of Shelter Rent to Gross Rent

D = The ratio of Utilities to Gross Rent

R = Shelter Rent increase factor

U = CPI Utility increase factor

(b) The ratio of Shelter Rent and the ratio of Utilities to Gross Rent used in the above formula were derived from 1979 AHS data. The weight given to Shelter Rent was 70 percent, and the weight given to Utilities was 30 percent for all SMSAs, the North Central, South, and West Census Regions. The weights were 67 percent and 33 percent for the Northeast Census Region. The percentage of units in the CPI rental survey that included the cost of heating, and the Shelter Rent increase factors calculated by use of the preceding formula are shown in Table B below.

Appendix C

(3) *Calculation of a Gross Rent Increase Factor*

(a) A single Gross Rent increase factor for each of the 37 SMSAs and the four Census Regions was calculated by weighting the percentage increase in Shelter Rent and the percentage increase in Utilities in accordance with the weights derived from the 1979 AHS as given in paragraph (2)(b) above. The formula used for the calculation was as follows:

G = A(R) + B(U)
(Solve for G to find Gross Rent increase)

G = Gross Rent increase factor

A = Weight applicable to Shelter Rent

B = Weight applicable to Utilities

R = Percentage increase in Shelter Rent

U = Percentage increase in Utilities

(b) The Gross Rent factors are shown in Table B below.

Appendix C

Table B

Percentage of rental units in the CPI rental survey that included the cost of heating, calculated Shelter Rent increase factor, and calculated Gross Rent increase factor for four Census Regions and 37 designated SMSAs

Census Region or SMSA	Percent of Units With Heat	Shelter Rent Factor	Gross Rent Factor
Northwest Census Region	44.5	1.061	.0999
North Central Census Region	38.1	1.063	.0807
South Census Region	20.9	1.074	.0943
West Census Region	21.6	1.105	.0900
Anaheim-Santa Ana-Garden Grove, CA	12.5	1.111	.0994
Anchorage, AK	58.1	1.037	.0616
Atlanta, GA	17.7	1.131	.1111
Baltimore, MD	34.9	1.077	.1019
Boston, MA	46.9	1.110	.1421
Buffalo, NY	22.2	1.036	.0789
Chicago, IL	51.7	1.056	.0610
Cincinnati, OH-KY-IN	52.7	1.092	.0971
Cleveland, OH	36.6	1.043	.0750
Dallas-Fort Worth, TX	36.7	1.082	.1341
Denver-Boulder, CO	35.7	1.087	.1026
Detroit, MI	42.3	1.041	.0702
Gary-Hammond-East Chicago, IN	51.7	1.056	.0763
Honolulu, HI	00.0	1.000	.1229
Houston, TX	41.8	1.071	.1063
Jersey City, NJ	64.3	1.050	.090[illegible]
Kansas City, MO-KS	25.6	1.055	.076[illegible]
Los Angeles-Long Beach, CA	12.5	1.111	.0994
Miami, FL	2.3	1.161	.1708
Milwaukee, WI	35.0	1.075	.0995
Minneapolis-St. Paul, MN-WI	34.7	1.090	.1230
Nassau-Suffolk, NY	64.3	1.050	.0908
New Brunswick-Perth Amboy-Sayreville, NJ	64.3	1.050	.0908
New York, NY	64.3	1.050	.0908
Newark, NJ	64.3	1.050	.0908
Northeast Pennsylvania, PA	26.5	1.032	.0785
Oxnard-Simi Valley-Ventura, CA	12.5	1.111	.0994
Patterson-Clifton-Passaic, NJ	64.3	1.050	.0908
Philadelphia, PA-NJ	58.0	1.051	.0899
Pittsburgh, PA	39.4	1.069	.0788
Portland, OR-WA	14.3	1.075	.0904
Riverside-San Bernardino-Ontario, CA	12.5	1.111	.0994
St. Louis, MO-IL	21.0	1.069	.0705
San Diego, CA	6.8	1.099	.1228
San Francisco-Oakland, CA	8.6	1.098	.0689
Seattle-Everett, WA	12.3	1.066	.0843
Washington, DC-MD-VA	55.5	1.088	.1030

Appendix C

(4) *Calculation of AAFs for Contract Rents Including Highest Cost Utilities*

(a) The distribution of all rental units covered in the 1979 AHS national sample shows that the 1978 to 1979 median percentage increases in gross rents declines at subsequently higher rent intervals. The data also suggest that the percentage increase at each rent level rises as the number of bedrooms increases. The actual distribution of units and the rent increases taken directly from the AHS data are shown in Table C.

(b) Increases for all rent intervals and bedroom sizes could not be obtained directly from the AHS data because of the small number of cases in the survey sample. This was especially true in regard to the number of efficiency and four-bedroom units. Estimated distributions were made in these categories to develop a complete matrix covering all rent ranges and bedroom sizes. The complete matrix is shown in Table D.

(c) Intermediate adjustment factors necessary to complete a matrix of percentage rent increases based on the single Gross Rent factor and the variations shown for rent ranges and bedroom sizes were delivered by dividing the factors in Table D by 6.5 percent, which is the overall rent increase from the 1979 AHS sample of rental units matched in 1978 and 1979. The intermediate adjustment factors developed by this procedure are shown in Table E.

(d) The intermediate adjustment factors in Table E were updated to 1982 by increasing the 1978 rent levels by 33.3 percent, which was the median rent increase for the four-year period. The updated factors necessary to compute percentage rent increases in Gross Rents by rent range and bedroom size based on the single Gross Rent factor developed for the most recent twelve-month period are shown in Table F.

Appendix C

(e) The AAFs for Contract Rents Including Highest Cost Utility applicable to each Census Region and the 37 designated SMSAs were calculated by multiplying the single Gross Rent increase factor developed for each area in Step (3) by the intermediate adjustment factors shown in Table F, and adding 1 to the result.

Tables C, D, E, and F are shown following the description of Step (5) below:

(5) *Calculation of AAFs for Contract Rents Excluding Highest Cost Utilities*

(a) The AAFs for Contract Rents Excluding Highest Cost Utility were calculated by developing a 1982 shelter rent for each $50 rent interval, and then dividing the 1982 shelter rent by the mid-point of the rent interval, which represents the 1981 shelter rent to be adjusted.

(b) The 1982 shelter rents were developed in a series of steps by (1) calculating 1981 utility costs for each bedroom size unit, and then adding the utility cost to the mid-point of each rent interval to obtain 1981 gross rents, (2) calculating a 1982 gross rent by applying the appropriate AAF for gross rent, and (3) calculating 1982 utility costs, and then subtracting the utility cost from the gross rent.

(c) The 1981 utility costs were calculated by updating 1979 utility costs for each Census Region derived from the AHS. The 1979 costs were increased by 21 percent, which was the overall utility increase indicated by the CPI. 1982 utility costs were calculated by updating the 1981 costs by the utility increase factor for each Census Region and SMSA shown in Table A. The 1979 utility costs from the AHS that were used in the preceding calculations were as follows:

AREA	0-BR	1-BR	2-BR	3-BR	4-BR
Northeast Census Region	50	65	80	95	110
North Central Census Region	35	50	65	80	95
South Census Region	35	50	65	80	95
West Census Region	30	40	50	60	70

Appendix C

TABLE C

Median percentage change in Gross Rent from 1978 to 1979 and number of cases in sample, by rent range and bedrooms where number of cases exceeds 100 units.

Gross Rent in 1978	0 bedrooms		1 bedroom		2 bedrooms		3 bedrooms		4 bedrooms	
	%	Units	%	Unit	%	Unit	%	Unit	%	Unit 1/
less than $100	12.5	100	12.2	302	12.1	260				
$100 to 149	8.0	138	7.9	751	10.2	766	8.9	201		
150 to 199	7.8	133	6.7	1,159	7.1	1,135	7.4	336		
200 to 249			7.0	927	6.4	1,326	4.8	400		
250 to 299			5.3	461	5.5	941	6.9	268		
300 to 349			4.8	134	5.0	459	5.3	232		
350 to 399					4.5	179	4.2	143		
400 to 449							4.9	111		
450 or more										

Note: Median percentage increase was 6.5 percent.
1/ Sample less than 100 units for each rent interval.
Source: 1978 and 1979 Annual Housing Survey, U.S. Summary (preliminary).

TABLE D

Estimated percentage change in gross rent from 1978 to 1979 by rent range and bedrooms based on Table C.

Gross Rent in 1978	0 bedrooms %	1 bedroom %	2 bedrooms %	3 bedrooms %	4 bedrooms %
less than $150	7.4	7.9	8.4	8.9	9.4
150 to 199	6.5	6.8	7.1	7.4	7.7
200 to 249	5.6	5.9	6.2	6.5	6.8
250 to 299	4.9	5.2	5.5	5.8	6.0
300 to 349	4.3	4.6	4.9	5.2	5.5
350 to 399	3.8	4.1	4.4	4.7	5.0
400 to 449	3.4	3.7	4.0	4.3	4.6
450 or more	3.1	3.4	3.7	4.0	4.3

Source: Estimated by EMAD, based on AHS.

Appendix C

TABLE E

Adjustment factors to be applied to median percentage increase in gross rent.

Gross Rent in 1978	0 bedrooms %	1 bedroom %	2 bedrooms %	3 bedrooms %	4 bedrooms %
less than $150	1.1385	1.2154	1.2923	1.3692	1.4462
150 to 199	1.0000	1.0462	1.0923	1.1385	1.1846
200 to 249	.8615	.9077	.9538	1.0000	1.0462
250 to 299	.7538	.8000	.8462	.8923	.9231
300 to 349	.6923	.7077	.7538	.8000	.8462
350 to 399	.5846	.6307	.6769	.7231	.7692
400 to 449	.5231	.5692	.6154	.6615	.7077
450 or more	.4769	.5231	.5692	.6154	.6615

Note: Factors developed from Table D for application to current CPI median gross rent percentage increase factor.

TABLE F

Adjustment factors updated to 1982 for application to percentage increase in gross rent developed for each Census Region and SMSA in Step (3) of AAF Methodology.

Gross Rent in 1982	0 bedrooms	1 bedroom	2 bedrooms	3 bedrooms	4 bedrooms
less than $200	1.1385	1.2154	1.2923	1.3692	1.4462
200 to 249	1.0346	1.0962	1.1577	1.2193	1.2808
250 to 299	.9306	.9770	1.0231	1.0693	1.1154
300 to 349	.8422	.8885	.9347	.9808	1.0193
350 to 399	.7538	.8000	.8462	.8923	.9231
400 to 449	.6962	.7423	.7885	.8346	.8693
450 to 499	.6385	.6846	.7308	.7769	.8154
500 to 549	.5808	.6269	.6731	.7192	.7616
550 to 599	.5231	.5692	.6154	.6615	.7077
600 or more	.4769	.5231	.5692	.6154	.6615

Note: The factors in Table F which reflect differences for rent ranges and bedroom sizes were applied to the single gross rent factor developed in Step (3) of the AAF Methodology to determine the AAFs for Contract Rents Including Highest Cost Utilities.

Appendix C

Example of Methodology Used for Calculation of AAFs as of Nov. 8, 1981 Boston, MA Standard Metropolitcan Statistical Area

(1) *Calculation of Rent and Utility Increase Factors Based on CPI*

$$\frac{\text{CPI Rent Index 1981}}{\text{CPI Rent Index 1980}} = \text{Rent Increase Factor} \quad \frac{218.7}{194.4} = 1.1250$$

$$\frac{\text{CPI Utility Index 1981}}{\text{CPI Utility Index 1980}} = \text{Utility Increase Factor} \quad \frac{380.7}{312.8} = 1.1271$$

(2) *Calculation of a Shelter Rent Increase Factor*

$I = A(CR + DU) + B(R)$ (See Methodology for identification of symbols)

$$R = \frac{I - ADU}{AC + B} \qquad R = \frac{1.125 - (.469)(.30)(1.2171)}{(.469)(.70) + .531} \qquad R = \frac{.9538}{.8593} \qquad R = 1.110$$

(3) *Calculations of a Gross Rent Increase Factor*

$G = A(R) + B(U)$ (See Methodology for identification of symbols)

$G = .70(.1100) + .30(.2171)$ $\quad G = .0770 + .0651$ $\quad G = .1421$

(4) *Calculation of AAFs for Contract Rents Including Highest Cost Utility*

Gross Rent Increase Factor developed in Step (3) above × Adjustment factor from Table F for each rent interval + 1 = AAF

$(.1421)(1.1385) + 1 = 1.162$ Calculated AAF for less than $200 rent interval

$(.1421(1.0346) + 1 = 1.147$ Calculated AAF for $200-249 rent interval

(Note: These examples are for the 0-Bedroom AAFs)

(5) *Calculation of AAFs for Contract Rents Excluding Highest Cost Utility*

1979 Utility Cost for 0-BR unit Northeast Census Region From AHS	$50
Increase in Utility Cost from 1979 to 1981 U.S. from CPI	× 1.21
1981 Utility Cost for 0-BR unit	$61
Increase in Utility Cost from 1981 to 1981 Boston SMSA from CPI	× 1.2171
1982 Utility Cost for 0-BR unit in Boston SMSA	$74
Mid-point of rent interval under $200 (1981 Shelter Rent)	$175
Plus 1981 Utility Cost	+ 61
1981 Gross Rent	$236
Multiply by AAF for Gross Rent at the $200-249 rent interval	× 1.147
1982 Gross Rent	$271
Minus 1982 Utility Cost	− 74
1982 Shelter Rent	$197

$$\frac{\text{1982 Shelter Rent}}{\text{1981 Shelter Rent}} = \text{AAF for Contract Rents Excluding Highest Cost Utility} \quad \frac{\$197}{\$175} = 1.126 \text{ AAF}$$

(Note: Approved AAF is 1.130 – difference is attributable to computer rounding)

Supreme Court, U.S.
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(3)

No. 92-551

In the

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

v.

ALPINE RIDGE GROUP, ET AL.,

Respondents.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Acacia Villa's Brief In Opposition

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QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 (1989), is an unconstitutional attempt by Congress to save money by legislatively abrogating express provisions of contracts of the United States to which the United States explicitly pledged its full faith and credit and for which the private party paid independent consideration?

Parties to the Proceeding

Petitioners Jack F. Kemp, *et al.*, omitted from the list of parties to the proceedings in the courts below the following:

Azusa Park Apartments, a California Limited Partnership; Capitola Gardens, a California Limited Partnership; Carondelet Apartments, a California Limited Partnership; Charter Oaks, a California Limited Partnership; Civic Plaza, a California Limited Partnership; Citrus Arms, a California General Partnership; Clayton Gardens, a California Limited Partnership; Columbus Terrace, a California General Partnership; Commerce Senior Citizens, a California Limited Partnership; Covina Manor, a California Limited Partnership; Country Club Village, a California Limited Partnership; El Portal Gardens, a California Limited Partnership; Fairvalley Villa, a California Limited Partnership; Fairway Apartments, a California Limited Partnership; Fallbrook Square Apartments, a California General Partnership; Foothill Gardens, a California Limited Partnership; Foothill Terrace, a California Limited Partnership; Frazier Park, a California Limited Partnership; Grandview Homes, a California Limited Partnership; Hayward Villa, a California Limited Partnership; Kern Villa, a California Limited Partnership; Lake Merritt Apartments, a California General Partnership; Lindley Manor, a California General Partnership; Little Tokyo, a California Limited Partnership; Mayflower Arms, a California Limited Partnership; Merced Gardens, a California Limited Partnership; Millbrook Park Apartments, a California Limited Partnership; Monterey Terrace, a California Limited Partnership; New Hampshire, a California Limited Partnership; Olive Tree Terrace, a California Limited Partnership; Palmdale East Q., a California Limited Partnership; Panorama Park, a California Limited Partnership; Pendleton Arms, a California Limited Partnership; Pleasant Hill Village, a California Limited Partnership; Presidio Park Apartments, a California General Partnership; Primrose Villa, a California General Partnership;

Rosswood Villa, a California Limited Partnership; Runnymede Gardens, a California Limited Partnership; San Gabriel Villa, a California Limited Partnership; San Jose Greens, a California Limited Partnership; Santa Teresa Apartments, a California Limited Partnership; Seaside Villa, a California Limited Partnership; Skypark Apartments, a California General Partnership; Southbay Villa, a California Limited Partnership; Surfside Villas, a California Limited Partnership; Terman Apartments, a California Limited Partnership; Tujunga Gardens, a California Limited Partnership; Tustin Gardens, a California Limited Partnership; Valencia Villa, a California Limited Partnership; Villa Del Comanche, a California Limited Partnership; Villa Olive Oak, a California Limited Partnership; Villa San Dimas, a California Limited Partnership; Villa Topanga II, a California Limited Partnership; Vista Park Chino, a California Limited Partnership; and Wasco Arms, a California Limited Partnership.

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Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (1989):

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United States Housing Act of 1937, as amended in 1974:

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Legislative History

135 Cong. Rec. S16,607 (daily ed. Nov. 21, 1989) (statement of Sen. Sasser) 12-13

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Acacia Villa's Brief In Opposition

INTRODUCTION

In the absence of any conflict among the federal courts of appeal, the Department of Housing and Urban Development ("HUD") presents this contract dispute in inflated terms to make it appear worthy of this Court's attention. Once HUD's rhetoric is peeled away, the case presents only two issues, neither of which justifies review by this Court.

The issue that occupies two-thirds of the argument in the government's petition is a routine matter of contract interpretation. The government simply asserts that the Ninth Circuit erred in interpreting the contract between HUD and the owners four years ago in *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), and that this Court erred in denying HUD's petition

for a writ of certiorari in that case, 490 U.S. 1066 (1989). Nothing has happened in the meantime to make this issue of contract interpretation any more significant than it was when this Court denied review in 1989.

The case also presents a constitutional issue, but it does not involve, as HUD would have it, a revival of *Lochner* era principles of substantive due process. On the contrary, the issue is merely whether the Constitution permits legislation repudiating HUD's obligation to pay the contract price after performance by a private party under a contract to whose fulfillment the United States has explicitly pledged its full faith and credit.[1] For more than a century, this Court has repeatedly answered that question with a resounding "No." *See, e.g., Sinking Fund Cases, 99 U.S. 700 (1879); Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986). There is no need to grant review in this case to reaffirm that principle again.

ARGUMENT

I. THE CONTRACT ISSUE

A. The Ninth Circuit Correctly Interpreted the Contract.

HUD treats the contract issue raised by this case as if it were an academic exercise in parsing contract language without the benefit of any background facts. Whatever surface plausibility HUD's reading of the contract might have evaporates when the contract is read in its real life context.

The contract dispute in this case involves the mechanism for adjusting for inflation federally subsidized rents under the

[1] The specific provision at issue is Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987, 2057 (1989) ("Section 801").

Section 8 housing program. The Section 8 housing program was not the government's first foray into the area of subsidized housing. On the contrary, Congress designed the Section 8 program to cure some of the defects of its immediate predecessors, the Section 221(d)(3) and the Section 236 low income housing programs. Under those programs, HUD reviewed developers' requests for rent increases on a case-by-case basis. The procedures HUD used were arbitrary, did not yield a fair rate of return, cost owners large amounts of time and money, and were open to subjective manipulation by HUD employees. *See* Declaration of Jona Goldrich (May 30, 1990) ¶3, Exhibit C1 to Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, *Acacia Villa v. Kemp*, 774 F. Supp. 1240 (C.D. Cal. 1990), *aff'd*, 955 F.2d 1382 (9th Cir. 1992) ("Goldrich Declaration").

In response to this situation, when Congress created the Section 8 program in 1974, Congress gave the Secretary of HUD the option of entering into contracts under which rent adjustments would be based on "a reasonable formula." Section 8(c)(2)(A) of the United States Housing Act of 1937, as amended in 1974, 42 U.S.C. §1437f(c)(2)(A) (1976). Section 8 also authorized the Secretary to enter into contracts requiring rent adjustments on a case-by-case basis, "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units." *Id.* Under Section 8, whether HUD chose contracts calling for adjustments based on a reasonable formula or contracts calling for case-by-case adjustments, the adjustments were not to cause material differences between the rents charged for assisted and comparable unassisted units. Section 8(c)(2)(C) of the United States Housing Act of 1937, as amended in 1974, 42 U.S.C. §1437f(c)(2)(C) (1976).

It is undisputed in the *Acacia Villa* proceeding that because of "negative experiences with the delays and extraordinary

administrative inconveniences associated with case-by-case adjustments, [the plaintiffs] participated in the Section 8 program only because the Section 8 HAP contracts, unlike the Section 221(d)(3) and Section 236 program contracts, provided for rent adjustments to be computed at least annually according to an equitable, timely and simplified formula to be published in the *Federal Register*." Goldrich Declaration ¶3.

HUD was fully aware that the attitudes of the *Acacia Villa* owners were shared by many other potential developers of Section 8 housing. The majority of potential Section 8 developers were unwilling to take part in the new program if it involved the inconvenience, delays, and inequitable results produced by HUD's case-by-case adjustments of Section 221(d)(3) and Section 236 rents. For this reason, in the Section 8 program, HUD did not use contracts that called for case-by-case adjustments. HUD opted to offer all developers contracts that explicitly called for rent to be adjusted "by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." HAP Contract §1.8(b)(2). As the Ninth Circuit held:

> Under the statute, HUD could choose either a market survey method (described in the first clause of Section 8(c)(2)(A)) *or* a formula method (described in the second clause of Section 8(c)(2)(A)). In the contract, HUD elected the formula method.

Rainier View Associates, 848 F.2d at 991.

These background facts, which HUD completely ignores, demonstrate the implausibility of HUD's contention that the parties intended to "permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey." *Id.* They highlight the correctness of the Ninth Circuit's interpretation of the contracts here at issue as requiring rents to be adjusted by multiplying the previous year's rent by a published inflation factor. As a result of this background, this

Court denied review of the contract issue when HUD requested it in 1989, 490 U.S. 1066 (1989), and should do so again today. "[T]his Court is not a forum for the correction of errors," *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting), and should not grant review merely to correct a purported error in contract interpretation that raises no issues of broader applicability.

B. The Ninth Circuit's Decision Does Not Allow Owners to Reap Windfall Profits.

Throughout its petition, HUD attempts to induce the Court to grant review by portraying the owners as rapacious landlords who have gulled the Ninth Circuit into permitting them to reap enormous windfall profits by charging "excessive rents" beyond those permitted by the statute and the contracts. *See, e.g.*, Petition at 14. HUD stresses that the statute and the contracts place a ceiling on rents, as if the owners had persuaded the Ninth Circuit to ignore those obvious provisions. In fact, neither the owners nor the Ninth Circuit have ever denied that "[t]he statute requires the Secretary to ensure comparability." *Id.* Neither the owners nor the Ninth Circuit have contended that the statute or the contracts permit the published "Adjustment Factors [to] be mechanically applied when to do so would yield excessive rents." *Id.* The owners and the Ninth Circuit fully recognize the Secretary's statutory and contractual authority and obligation to see to it that rents paid under the program increase at the same rate as rents for unassisted units. *See Rainier View*, 848 F.2d at 989. The owners contend and the Ninth Circuit held only that the contracts which HUD drafted and signed were designed to achieve and maintain comparability in rent adjustments through a formula which HUD would modify as appropriate, but which it could not abandon because it did not like the results. *See id.* at 991.

HUD asserts that only case-by-case comparability studies can take into account all the myriad small details that affect the

rental value of an apartment. Therefore, HUD claims that if it adjusts rents simply by applying published inflation factors, it will not be able to avoid violating the limitations on rent adjustments imposed by the statute and the contract. According to HUD, rent adjustment must be based on case-by-case comparisons to prevent the annual rent adjustment process from causing material differences between rents for assisted and unassisted units. HUD's argument is unfounded and rests on a confusion between what must be done to *establish initial rents* and what must be done to *adjust those rents for inflation.*

HUD negotiated the initial rent for each apartment with the owners. As a result of HUD requirements, Section 8 apartments were often located in neighborhoods where land values were high. HUD frequently mandated costly features rarely found in moderate-income apartments. Furthermore, HUD required developers to pay Davis-Bacon Act wages and to incur additional operating and administrative costs to comply with various HUD regulations. Congress recognized that because of the special features of Section 8 apartments and the special costs associated with building and operating them, initial rents for Section 8 apartments would often need to be up to 20 percent higher than the levels established as "fair market rentals" by the Secretary of HUD. *See* Section 8(c)(1) of the United States Housing Act of 1937, as amended in 1974, 42 U.S.C. 1437f(c)(1) (1976). The statute does not define the term "fair market rentals." The original HUD regulations interpreting this term defined it as "the rent, including utilities (except telephone), ranges and refrigerators, parking, and all maintenance, management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design meeting the objectives of the HUD Minimum Property Standards." 24 C.F.R. §880.102 (1976).

When HUD negotiated initial rents, it took into account all the individual features of each apartment, including the many special features required by HUD. The initial rent represented HUD's estimate of the appropriate rent for each apartment in light of all the facts and the constraints imposed by the statute and HUD's own regulations. Detailed comparisons with other apartments may have been appropriate as part of that process, even though the most comparable apartments in the unassisted market were often quite different from Section 8 apartments.

Such comparisons are neither necessary nor appropriate parts of the process of *adjusting rents* for inflation. The annual rent adjustments called for by the statute and by the contracts focus only on the appropriate *percentage change* in the initial rent. They are intended to account for the *rate* of inflation or deflation of rents in whatever market area HUD deems appropriate. They do not allow HUD, in the guise of insuring comparability, to repudiate unilaterally the initial rents HUD negotiated with the developers, and on which the developers relied when the contracts were entered into and the apartments built.

Neither logic nor experience suggests that the kinds of differences between apartments that can be accounted for only on a case-by-case basis affect the *inflation rate* for apartment rents. Once the initial rent is determined, taking into account all relevant features of the assisted apartment and the rents of unassisted units, application of a factor that accurately represents inflation or deflation in the appropriate rental market for apartments in the same price range, of the same general type, and with the same number of bedrooms, will produce an appropriate adjustment.

HUD can and should perform checks to insure that the inflation rates it publishes produce accurate results, and should modify the factors if they do not. If, for example, the market in which an apartment is located has experienced a lower or higher

rate of inflation than the larger market of which it forms part, HUD can and should publish adjusted inflation factors that reflect conditions in that sub-market and that will apply to all Section 8 units in the sub-market. None of this, however, justifies abandoning use of the published factor and a return to arbitrary case-by-case adjustments by untrained HUD clerks under pressure from their superiors to reduce HUD's obligations.

HUD assumes throughout its Petition that its comparability studies constitute an accurate benchmark against which to measure rentals. Nothing in the record supports this contention. On the contrary, the district court in *Rainier View* held that HUD performed its comparability studies so deficiently that they violated procedural due process. *Rainier View Associates v. United States*, No. C83-997R (W.D. Wash. Feb. 28, 1984), Order re Cross Motions For Summary Judgment, reproduced in Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *United States v. Rainier View Associates*, No. 88-1515, at 30a. Appraisals carried out by HUD clerks without any "guidelines to ensure that the comparability reviews are conducted pursuant to some consistent system or methodology," *id.*, are much less accurate guides to fair rentals than the rents determined by multiplying initial rents by the inflation factors HUD's Central Statistical Offices produce.

It is undisputed in *Acacia Villa* that "[c]ontinued failure to receive the full amount of the rent adjustments required by the HAP contracts may put some of the projects in precarious financial conditions. Inadequate cashflow will make it difficult or impossible to maintain the buildings properly and to take all of the security measures which are becoming increasingly necessary at certain complexes." Goldrich Declaration ¶23. The uncontroverted evidence, therefore, shows inadequate rents rather than windfalls.

The owners do not ask for rent adjustments larger than the statute and the contracts permit. What the owners do ask is that HUD honor its contracts and not attempt to use arbitrary case-by-case adjustments to reduce rents below the levels called for by the contracts. It is not a windfall to receive a rent set by applying inflation factors published by HUD to the initial rent negotiated by HUD and determined by HUD to fall within the range permitted by the statute and by HUD's regulations. The contracts explicitly call for precisely that mechanism of rent adjustment, and the owners would not have entered the program if the contracts had called for case-by-case adjustments. As a matter of law, "gains reasonably to be expected from [a] contract" are not windfalls. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31, *reh'g denied*, 431 U.S. 975 (1977). *Accord, El Paso v. Simmons*, 379 U.S. 497, 515, *reh'g denied*, 380 U.S. 926 (1965). There is, therefore, no need for this Court to grant review to avoid a purported windfall at the government's expense.

II. CONSTITUTIONALITY

The Ninth Circuit held that the Constitution does not permit Congress to save money by repudiating its explicit contractual commitments after accepting goods and services under a contract with a private party to which the United States has pledged its full faith and credit. The logic of the Ninth Circuit's holding is simple and non-controversial. The decision rests on well-established principles of constitutional law that do not require review by this Court. The Ninth Circuit reached its conclusion on the following basis:

1. The owners' contract right to rents determined by applying the published Automatic Annual Adjustment Factor is a vested right.
2. Section 801 substantially impairs those rights.

3. The congressional purpose in passing Section 801 is not sufficiently important to permit abrogation of those rights.

This Court has repeatedly taught that contract rights supported by independent consideration are vested. *See Lynch*, 292 U.S. 571; *Perry*, 294 U.S. 330; *Bowen v. Public Agencies*, 477 U.S. at 55. The vested nature of the rights here at issue is highlighted by the fact that in the statute and in the contracts the United States explicitly pledged its full faith and credit. *See* 42 U.S.C. §1437c(c) (1976); Contract between HUD and Antelope Valley Apartments §1.3(a). (Exhibit 2C to Goldrich Declaration).

The principle that the government must honor contracts for goods and services with private parties is fully compatible with this Court's decision in *Bowen v. Public Agencies*. Indeed in that case, this Court explicitly recognized that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." 477 U.S. at 52 (citations omitted). This Court explicitly distinguished the rights at issue in *Bowen v. Public Agencies* from those which had been held to constitute "property" within the meaning of the Fifth Amendment. It pointed out that the provision at issue in *Bowen v. Public Agencies* "constituted neither a debt of the United States, see *Perry v. United States*, *supra*, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch v. United States*, *supra*." 477 U.S. at 55.

HUD asserts that this case does not "repudiate a legislatively promised benefit for which private parties paid consideration as in *Lynch*," Petition at 21, but the facts belie HUD's contention. The owners entered into contracts that stipulated an initial rent which would be adjusted *only* under a formula set forth in the contract. In consideration for HUD's promise to pay rent on that basis, the owners expended hundreds of millions of

dollars on the construction of apartment buildings, made the apartments available to low-income tenants, and operated the apartments in accordance with HUD's rules and regulations under the Section 8 housing program. This is exactly the sort of bargained for right which this Court distinguished from the situation it confronted in *Bowen v. Public Agencies*. *See* 477 U.S. at 55.

Contrary to HUD's contentions, the Ninth Circuit fully recognized the power of Congress to pass "curative" legislation to undo a judicial interpretation of a preexisting statute, even when the curative legislation extinguishes claims against the government. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1386 (9th Cir. 1992), Petition at 10a. The Ninth Circuit acknowledged that Congress has authority to amend the laws and thereby to extinguish claims to *benefits gratuitously conferred* by statute, even after a court has interpreted the statute as creating certain rights. The Ninth Circuit correctly held, however, that this power does not extend to extinguishing *bargained for contract rights* supported by independent consideration. *Id.* As the Ninth Circuit stated, the case the government relies upon, *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84 (1958), *reh'g denied*, 358 U.S. 937 (1959), involved a refusal to interpret contracts as containing *implied* provisions foreclosing the exercise of sovereign power by the government. *The Darlington* does not suggest that an *explicit* contractual right, for which independent consideration has been provided and to which the full faith and credit of the United States has been pledged, is not vested because Congress may abrogate it at any time, for any reason, or no reason. The Ninth Circuit's conclusion that the owners' rights are vested and constitute property reflects the settled jurisprudence of this Court.

In the Ninth Circuit, HUD did not contest that Section 801 substantially impairs the owner's exercise of their vested contract rights. *Alpine Ridge Group*, 955 F.2d at 1387, Petition at

12a. In this Court, HUD argues, albeit only in a footnote, that there is no substantial impairment because rent increases determined by using a properly adjusted inflation factor "*could* presumably have produced the same financial result for Section 8 landlords as the approach HUD adopted...." Petition at 20 (emphasis added). Even if in a given case application of an adjusted inflation factor did by chance lead to the same results as the HUD comparability study, the owners would still be damaged by having to submit to a cumbersome, arbitrary, time-consuming, and expensive process not provided for in their contract. HUD makes no effort to refute the owners' evidence that after their experience with previous programs, they would not have entered the Section 8 program had they known that HUD would attempt to make case-by-case rent adjustments in the Section 8 program. Furthermore, that a properly adjusted inflation factor *could* lead to the same dollar result as a comparability study in a given case, is no evidence that the owners have not suffered serious financial harm through HUD's use of comparability studies to reduce its rent obligations.

Having held that Section 801 substantially impairs vested contract rights that constitute property, the Ninth Circuit inquired whether the congressional purpose was sufficiently important to justify such impairment. Neither in the court below nor in this Court does HUD contend that the government may abrogate vested contractual rights of parties to a contract with the government solely to save money. *See Alpine Ridge Group*, 955 F.2d at 1387, Petition at 13a; Petition at 21; *cf. Lynch*, 292 U.S. 571; *Perry*, 294 U.S. 330. Section 801 is on its face a provision designed to reverse the Ninth Circuit's *Rainier View* interpretation of HUD's obligations under the HAP contracts and thereby to save the costs involved in complying with the contracts. In the words of one of the bill's principal sponsors, Section 801 was a "fix" intended to "save the Government hundreds of millions, if not more than a billion dollars." 135

Cong. Rec. S16,607 (daily ed. Nov. 21, 1989) (statement of Sen. Sasser).

Both in the courts below and in this Court, HUD attempts to save Section 801 from invalidity by inventing other purposes for the legislation. In this Court, HUD points to three purported goals of Section 801 beyond saving money: 1) to put an end to litigation with its resulting uncertainty; 2) to avoid excessive rents; and 3) to correct flaws in HUD's application of comparability studies in the past. Petition at 22. The courts below fully considered and properly rejected each of these purported justifications for the statute.

As the district court stated in *Acacia Villa*, 774 F. Supp. at 1250, Petition at 59a, the first justification, the resolution of the dispute, "is little more than bootstrapping. The dispute is about the fact that the contracts have been interpreted adversely to the government by the Ninth Circuit; the government now wants to avoid paying the project owners the amount that the contracts, as so interpreted, require. Again, the government is only concerned with dollars."

The government's purported desire to "reinstate the program's market-rent premise," Petition at 22, is a thinly veiled euphemism for paying less than the contracts require. The purpose is simply to save money.

The purported objective of correcting flaws in HUD's past use of comparability studies is no justification at all. Since application of comparability studies is a violation of the owners' contract rights, the government cannot justify application of the studies on the ground that it seeks to apply them more equitably where the government had no right to apply them at all. *Acacia Villa*, 744 F. Supp. at 1250, Petition at 58a-59a.

Because none of HUD's purported objectives for passage of Section 801 resist critical analysis, the Ninth Circuit concluded that Congress enacted Section 801 solely to save money,

as is evident from the face of the statute and from its legislative history. *Alpine Ridge Group*, 955 F.2d at 1387-88, Petition at 14a.

The Ninth Circuit's decision that Congress could not abrogate HUD's contractual obligations and the United States' pledge of its full faith and credit simply to save money rests on well established principles and does not require review by this Court.[2]

[2] Because the Ninth Circuit concluded that the legislation had been passed solely to save money and therefore violated due process, it did not reach the question of whether Section 801 would violate the due process clause even if it had some purpose other than simply saving money. The owners contend that even in that case Section 801 would violate due process. The Ninth Circuit similarly did not reach the owners' contention that Section 801 violates not only the due process clause, but also the taking clause of the Fifth Amendment and the prohibition in the Fourteenth Amendment against questioning the public debt. These remain viable alternative grounds for holding the statute unconstitutional.

CONCLUSION

This case presents only a routine issue of contract interpretation and a constitutional question that is fully resolved by application of the undisputed principle that the United States may not, in order to save money, refuse to honor its contractual obligations to a private party that has fully performed its side of the bargain when the United States has pledged its full faith and credit to the fulfillment of those obligations. The case poses no questions that require review by this Court.

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October 23, 1992

(5)

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In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit's holding that an Act of Congress is unconstitutional warrants this Court's review. Contrary to respondents' contentions, more is at stake than a simple contract issue and a well-worn application of the Due Process Clause. This case implicates the terms on which HUD must do business with thousands of Section 8 project owners every year. Moreover, if the court of appeals correctly interpreted the Section 8 contracts, this case raises important and unsettled questions about the substantive due process limits on Congress's power to modify contractual rights in federal programs.

1. Respondents contend (Acacia Br. in Opp. 1-2, 5) that the proper interpretation of the Section 8 contracts is not

worthy of this Court's review. As our petition explains, however, the constitutional issue the court of appeals decided arises *only if* respondents had the contract right they claim—the right to prevent HUD from using individualized comparability studies as a separate cap to formula-based rent adjustments. Pet. 11-12. The court of appeals held that Section 801 of the Department of Housing and Urban Development Reform Act of 1989 is unconstitutional because it "abrogates the owners' vested property rights in violation of the fifth amendment." Pet. App. 14a. That holding is clearly wrong if the owners lacked such "vested property rights." It is for that reason that the contract issue merits this Court's attention.

The Court has repeatedly stated that the declaration that an Act of Congress is unconstitutional "is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). When a case may be decided on a non-constitutional ground, it is this Court's settled practice to avoid the resolution of the constitutional issue. *E.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The court of appeals in this case did not pause to examine whether respondents are entitled to the contract rights they assert, instead relying solely on its interpretation of the contract in *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989). The three courts outside of the Ninth Circuit that have examined the issue independently, however, have each determined that *Rainier View*'s interpretation of the Section 8 contract is wrong.[1] If this Court were to agree, it would become

[1] See *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 687 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.); *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.). In all three cases, the courts held that Section 801 is constitutional because Section 8 project owners never had the right to be free from the use of comparability studies as a separate cap to rent increases. Accordingly, those courts concluded that Section 801 does not infringe contract rights. In defending the Ninth Circuit's approach, respondents ignore these decisions and their reasoning.

apparent that the court of appeals' invalidation of an Act of Congress rests on a deeply flawed premise.

2. Respondents' defense of the *Rainier View* reading of the Section 8 contracts is remarkable for its avoidance of the language of the contract. In arguing that HUD must grant adjustment factor increases without application of a separate comparability cap, the Acacia respondents never refer to the "overall limitation" provision of the contract, which expressly states that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." HAP Contract, § 1.9d. Instead, respondents rely on "background facts," "real life context," and "attitudes of the *Acacia Villa* owners" to support their assertion that project owners had a settled expectation that rents would be "adjusted by multiplying the previous year's rent by a published inflation factor" and that there would be no "case-by-case rent adjustments." Acacia Br. in Opp. 2, 4, 12; see Alpine Br. in Opp. 2-3.

The right approach, however, is to read the plain language of the contract, and that language—supported by the Secretary's regulations and the statute—establishes that HUD can apply a comparability cap to a particular project when the published adjustment factor would result in "material differences between the rents charged for

assisted and comparable unassisted units." HAP Contract, § 1.9d; 24 C.F.R. 880.609(c); 42 U.S.C. 1437f(c)(2)(C) (1982); Pet. 13-17. Indeed, prior to this litigation, representatives of the housing industry acknowledged that comparability studies *would* serve as a cap to formula-based increases. In 1984, Charles L. Edson, counsel to the National Leased Housing Association, testified to a congressional committee that

> in structuring section 8, Congress meant it to be a market program. Rents would rise by either the fair market rents in the area, or a reasonable formula * * *, *but there was a cap, a market discipline cap, and that is where comparabilities came in. Rents could not exceed the rents of a comparable project in the area.*[2]

In meetings around the country, HUD explained to prospective Section 8 developers that rents would rise based on "the market index capped only by comparability."[3] The contention voiced by respondents now—that they had a legitimate expectation that the Adjustment Factors would apply automatically and without regard to the results of comparability studies for a particular project—is therefore unfounded.[4]

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[2] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 21 (1984) [1984 House Hearings] (emphasis added).

[3] 1984 House Hearings, *supra* at 21.

[4] Respondents also criticize HUD's manner of conducting comparability studies (see Acacia Br. in Opp. 8; Alpine Br. in Opp. 16-17), but this case presents no issue as to whether the particular procedures employed by HUD in conducting comparability studies were administratively reasonable. Rather, it involves only the general issue of whether HUD had authority under the contracts to use the results of comparability studies to cap formula-based adjustments.

The Alpine Ridge respondents devote much of their argument (Br. in Opp. 7 n.12, 11-19) to the claim that HUD's "real purpose" in using comparability studies was to erase differentials between contract rents and rents at comparable unassisted projects established in the original agreements. That contention is wrong. As both HUD's regulations and the contract make clear, the comparability cap explicitly preserves "differences [that] existed with respect to the contract rents set at Contract execution or cost certification." 24 C.F.R. 880.609(c); HAP Contract, § 1.9d (overall "limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents").[5] Comparability studies thus served, not to eliminate the original differential, but to protect against excessive rent increases in light of local market conditions.[6] In claiming

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[5] Suppose, for example, that in 1980 the original contract rent were set at $350, while rents at a comparable project were $320. HUD's process for granting rent increases preserved that $30 differential. As HUD explained in a 1986 memorandum, it applied the comparability cap only when the Adjustment Factor produced a *materially* different rent increase from a comparability study, and "[a] material difference exists whenever the adjusted Section 8 rent would *exceed* 120 percent times the sum of the comparable rent and the initial difference." *National Leased Housing Ass'n*, 22 Cl. Ct. at 661. Therefore, under that approach, if the results of a comparability study in 1984 indicated that rents at comparable projects were $330, the cap would be 120% times the sum of $330 *plus the initial difference of $30*, producing a rent cap of $432. The initial difference was thus preserved under HUD's methodology; Alpine's position goes far beyond preserving the initial difference and insists on payment of the full Adjustment Factor increase, even if it produced rents of $450, $500, or $550.

[6] Local market conditions often varied substantially from the general Adjustment Factor increases because Adjustment Factors were computed only for 74 metropolitan areas and the four Census Regions. All projects within a Census Region were governed by the same Adjustment Factor if they were not in one of the 74 metropolitan areas.

that the Adjustment Factors must be applied automatically, respondents assert nothing less than the right to keep such excessive rent increases.

3. In discussing the constitutional issue, respondents, like the court of appeals, treat this case as though it is on all fours with *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Alpine Br. in Opp. 20; Acacia Br. in Opp. 10. It is not.

a. This case involves a claimed contractual right to a *process* for computing rental increases. No decision of this Court has held that such a process is immune from legislative revision. At issue in *Lynch* was the right to payment of specific insurance benefits; at issue in *Perry* was the right to payment on a government bond. This case involves rights of a different character. Respondents do not claim that they had a contract right to any specific rent increase. They do not even contend that HUD was barred from using comparability studies as a means of modifying rent increases. Their contention is limited to the proposition that HUD could use comparability studies only in modifying the factors used to produce the adjustment formula, rather than as an independent rent-adjustment cap. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 662.

The right respondents assert is therefore a right to a particular process for adjusting rents. This Court has never held, however, that parties contracting with the government have a substantive due process right to be free from modifications in procedures. It would be particularly

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Thus "the depressed markets that prevailed in the Pacific Northwest during the early 1980s" would have received the same increase as "the hyperinflated housing markets of southern California." HUD, *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937*, at 7 (July 27, 1990). HUD used comparability studies as caps to avoid such unjustified results.

wrong to find a protected right to the procedures here, because respondents had no expectation that the financial results under their approach would be any different from HUD's approach. Under everyone's reading of the contract, HUD had an obligation to avoid "material differences" between assisted and comparable unassisted units; the only issue is *how* HUD reached that result. But "[w]hichever methodology is employed, the rent adjustment, in effect, would be based on the same comparability study and the amount of the rent adjustment should be the same." *National Leased Housing Ass'n*, 22 Cl. Ct. at 662.[7]

b. In our petition, we argue that Section 801 is valid as "curative" legislation, designed to remedy the unexpected decision in *Rainier View*, and is supported by valid legislative purposes other than saving the government money. Pet. 17-20, 21-22. Respondents barely respond to our reliance on decisions upholding "curative" legislation. Acacia contends that Congress can correct mistaken decisions only when they affect "benefits gratuitously conferred," while Alpine asserts that Congress may act only to modify "[u]nliquidated claims." Acacia Br. in Opp. 11; Alpine Br. in Opp. 20. But this Court has upheld curative legislation cutting off a "vested" claim to a tax

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[7] The district court explained that point in *Carmichaels Arbors*: "[T]he overall limitation provision almost seems to require that HUD undertake some sort of market survey to determine whether a material difference exists. * * * And once it is conceded that HUD can undertake a market survey to decide whether a material difference exists, it is oddly formalistic to require that HUD recalculate the [Adjustment Factors] to arrive at a number that is not materially different from the number produced by the market survey. *By definition, the number will not be materially different.*" 789 F. Supp. at 689 (emphasis added). Acacia does not seriously dispute that conclusion. Acacia Br. in Opp. 12. Alpine does dispute it, but that is only because of Alpine's impression that comparability studies fail to preserve "the initial relationship of contract rents to the market." Alpine Br. in Opp. 7 n.12. As we explain, see p. 5, *supra*, that impression is wrong.

benefit, *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931), and the rationale of the "curative legislation" cases is fully applicable here. Until *Rainier View* it was thought by HUD, Congress, and the housing industry itself (see p. 4, *supra*) that comparability caps were legitimate. Congress acted responsibly, and constitutionally, in moving quickly to reestablish the permissibility of comparability caps.

Respondents also echo the court of appeals' assertion that Congress's sole purpose in enacting Section 801 was to save the government money. Acacia Br. in Opp. 12-14; Alpine Br. in Opp. 21. The proper approach in evaluating the constitutionality of social and economic legislation, however, is not to assume the worst; it is to uphold the legislature's action if a legitimate basis for the law may "conceivably" have been the purpose of the legislature. *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2334 (1992); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). Here, not only is it conceivable that Section 801 served legitimate purposes, the statements of Section 801's sponsors describe several such purposes: the law was designed to put an end to wasteful disputes over the manner of granting rent increases in the Section 8 program; to eliminate uncertainty that could hinder the program's objective of providing low-income housing; and to restore the program's market-rent premise. Pet. 8 n.4. In branding Congress's action solely as an economy measure, the court of appeals ignored the law's more general purpose to strengthen the Section 8 low-income housing program.

These constitutional questions warrant this Court's review. The issue here involves thousands of Section 8 contracts and implicates many millions of dollars in government payments. Project owners around the country are actively litigating the constitutionality of Section 801, while HUD is taking steps to implement the

law's mandate.[8] As industry representatives are well aware, the pendency of this dispute has disrupted the smooth operation of the Section 8 program. See National Leased Housing Ass'n, et al., Amici Br. 3-6 (urging the Court to grant certiorari to ensure uniform treatment of project owners nationwide). Until this issue is definitively resolved, the stability, predictability, and efficiency of the Section 8 program will be undermined.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1992

[8] HUD has recently issued proposed regulations to govern the process of conducting and using comparability studies. See HUD, *Annual Adjustments of Contract Rents for Section 8 Assisted Housing; Comparability Studies*, Docket No. R-92-1602; FR-2822-P-01, 57 Fed. Reg. 49,120 (Oct. 29, 1992).

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Petitioners,

vs.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEASED HOUSING ASSOCIATION AND OTHER ENTITIES AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

The amici curiae are (1) the National Leased Housing

Association and (2) 254 entities[1] who own and/or operate apartment projects and have entered into Housing Assistance Payments Contracts ("HAP Contracts") with the Department of Housing and Urban Development, pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437. The majority of Amici are appellants in an action pending before the United States Court of Appeals for the Federal Circuit, *National Leased Housing Association v. United States*, No. 92-5064 (appeal filed on March 27, 1992)[2] who seek to recover the unpaid portion of rent adjustments which, they contend, they are entitled to receive under the HAP Contracts. As explained in more detail in the following argument, the Amici have a vital interest in the outcome of the instant petition for writ of certiorari ("Petition"): Consideration of the validity of the Ninth Circuit's decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992) will undoubtedly involve analysis of a prior decision of the Ninth Circuit, *Rainier View Assocs. v. U.S. Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), which addressed the method by which HUD may calculate rent adjustments under the HAP Contracts. That analysis will directly effect the outcome of the NLHA Action, and several other actions pending elsewhere in the Federal courts. The Amici support the

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1. The amici curiae ("Amici") are listed individually in Appendix A to this brief.

2. The *National Leased Housing Association* case has been consolidated with several other actions, also pending in the Claims Court, which raise identical factual and legal issues. These actions include *Alturas del Senorial v. United States*, No. 204-88C (Claims Court), *Bramblewood, a Utah Limited Partnership v. United States*, No. 324-87C (Claims Court), and *Allison Village Assocs. v. United States*, No. 90-6C (Claims Court), all of which were consolidated with the NLHA Action. An additional action, *Athens Gardens Ltd v. United States*, No. 91-1181C (Claims Court), was filed in June 1991 and was stayed pending the outcome of the NLHA Action. For the sake of convenience, these cases will be referred to collectively as the "NLHA Action."

granting of the Petition, so that the Court can determine conclusively the validity of the *Rainier View* and *Alpine Ridge* decisions, and thereby establish a uniform national rule concerning the determination of rent adjustments under the HAP Contracts.

The Amici have obtained the consent of the Petitioner and the Respondents to the filing of this brief and have filed the consents with the Court.

SUMMARY OF THE ARGUMENT

Amici urge the Court to grant the instant Petition. The Petition seeks review of the Ninth Circuit's decision in *Alpine Ridge* which held unconstitutional Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 100-628, 103 Stat. 2057, ("HUD Reform Act"). Section 801 attempted, among other things, to reverse by statute the result reached by the Ninth Circuit in *Rainier View*, concerning the method by which HUD made rent adjustments under the HAP Contracts and to provide project owners with only 30 percent of the recovery that they would be entitled to receive under *Rainier View*. Amici wholly support the Ninth Circuit's opinions in *Rainier View* and *Alpine Ridge*. They urge the Court to grant the Petition, however, so that the Court may consider the validity of the *Rainier View* decision. A definitive statement by the Court of the validity of the Ninth Circuit's holding in *Rainier View* will finally establish a uniform national rule concerning the method for making rent adjustments under the HAP Contracts and put an end to an apparent dispute among the Federal courts concerning the method of making those rent adjustments.

ARGUMENT

The Amici, owners of apartment projects around the United States, entered into the HAP Contracts with HUD. The HAP

Contracts provide, *inter alia*, for payments from HUD (directly or though state agencies, in some cases) to the project owners, which payments subsidize the rents of qualifying tenants by paying the difference between what the tenants can afford and the market rent. The HAP Contracts provide a mechanism, termed the automatic annual adjustment factor ("AAAF"), to adjust the rental subsidy payments made to the project owners over the length of the HAP Contract. 24 C.F.R. 880.110 (1977). The Amici believe that *certiorari* should be granted here to resolve a long-standing dispute concerning the method by which rental adjustments are made under the HAP Contracts — the resolution of which may trigger a constitutional decision of great import.

The apparently simple AAAF-based mechanism for making periodic adjustments in the rents paid under the HAP Contracts has nevertheless generated enormous controversy. Beginning in about 1981, HUD began to abandon the AAAF-based rent adjustment mechanism in favor of project-by-project analyses of changes in comparable rents, which often resulted in rent adjustments far below the amount to which the project owners were entitled pursuant to the AAAFs. In response to this change in policy, project owners across the country challenged HUD in court over the use of project-by-project comparability studies.

In *Rainier View*, the Ninth Court held that, having initially chosen to employ the AAAFs to make market rent adjustments, HUD was not free to use comparability studies to make rent adjustments. The Ninth Circuit, in the instant case, *Alpine Ridge*, reaffirmed the *Rainier View* holding and went further to hold as unconstitutional Section 801 of the HUD Reform Act which allows the project owners to receive only 30 percent of the amount they would otherwise be entitled to receive under the AAAFs. The Amici strongly concur in the *Rainier View - Alpine Ridge* opinions for the reasons to be set forth by the Respondents in *Alpine Ridge* in their opposition to the petition for certiorari. Several courts,

including the Claims Court in the NLHA Action, however, have chosen not to follow the *Rainier View-Alpine Ridge* line. *NLHA Action*, 22 Cl. Ct. 649 (1991), *appeal pending*, No. 92-5064 (Fed. Cir.); *Carmichaels Arbors Assocs. v. United States*, 789 F. Supp. 683 (W.D. Pa. 1992), *appeal pending*, No. 92-3326 (3rd Cir.); *Sheridan Square Partnership v. United States*, 761 F. Supp. 783 (D. Colo. 1991). As a result of the profound disagreement among the courts in the circuits, project owners are subject to unacceptably unequal treatment.

The disparate interpretation of the courts in the circuits concerning the contract rights of project owners, such as Amici and others, to an AAAF-based rental adjustment, and their obligation to accept 30 cents on the dollar owed as reflected in Section 801, make it impossible for HUD to administer the Section 8 rent subsidy program uniformly throughout the country. This Court alone can resolve the fractious disagreement between the courts by producing a definitive interpretation of the HAP Contracts and the respective rights of the project owners and HUD.

This resolution can only occur, however, if the Court accepts certiorari to determine whether Section 801 is constitutional: The instant Petition, which challenges the *Alpine Ridge* Court's determination that Section 801 violates the Constitution, raises immediately the validity of the *Rainier View* holding also. As the government's brief acknowledges (Petitioner's Brief at 11-17), a necessary question in determining the constitutionality of section 801 is whether the project owners, as *Rainier View* held, are entitled by contract to a rent adjustment based solely on the AAAFs. Resolution of the issues raised in the instant petition therefore necessarily requires the Court to determine the validity of the *Rainier View* holding as to the project owners' underlying contract interest in rent adjustments based solely on the AAAFs. Thus, by accepting certiorari here, the Court will at last make possible a definitive interpretation of the HAP Contracts and

eliminate the real possibility of disparate treatment based on the location of their property.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant certiorari and affirm the decision of the Ninth Circuit in *Rainier View* and *Alpine Ridge*.

Dated: October 26, 1992

Respectfully submitted,

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APPENDIX A

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Alameda Terrace, Ltd.
Alturas de Senorial Associates
Ashbrooke Apts. Ltd.
Barbour County Apts., Ltd.
Beacon Hill Limited Partnership Community Management Corp.
Bellefontaine Gardens, Ltd. Bethesda Corp.
Birchwood Gardens, Ltd.
Bramblewood, A Utah Limited Partnership
Brandywood Acres Limited Partnership
Brent Gardens, Ltd.
Briarcliff Manor Limited Partnership
Brookside Hills Limited Partnership
Bulldogger Apartments
Burrell T. Davis
Cahaba Apartments, Ltd. Camden Way I, Ltd.
Camden Way II, Ltd.
Cedar Rapids Venture
Chaska Partners, Ltd.
Cheyenne Villa Limited Partnership
City Court II Apts., Ltd.
Colinas de San Juan Associates
Columbus Gardens, Ltd.
Cornelius, ALP
Countryside, A Utah Limited Partnership
Covadonga, LDP
Covington Apartments, Ltd.
Creekview Manor, Ltd.
Daleville Manor Co.
Damy-Franklin Realty Trust
Dana A. Patterson, Inc.

Appendix A

Dandridge Towers, Ltd.
Deerfield Apartments, Ltd.
Edward J. Roy Trust
El Verde Associates
Elk Associates
Elmwood Ltd.
Englewood Square, Ltd.
Englewood Village, Ltd.
Escalante III, WRP Limited Partnership
Eufaula Apartments, Ltd.
Fairfield Senior Citizens, Ltd.
Falls Meadowridge Ltd., Partnership
Farmington Court Associates Farrington, Ltd.
Forest Hill Limited Partnership
Forest Park South, Ltd.
Forest Park, Ltd.
Four Winds West Company
Gainesville Housing Authority
Gateway, ALP
Gray Hill Limited Partnership Community Management Corp.
Greenwood Apartments
Harriman Gardens, Ltd.
Heflin Apartments, Ltd.
Heritage House, A Utah Limited Partnership
Highland Manor, Ltd.
Highland Park Apts., A Texas General Partnership
Hillcrest Apartments Co.
Holly Haven I WRP Limited Partnership
Holly Haven II WRP Limited Partnership
Hollywood Fountain North, A California Limited Partnership
Hollywood Fountain South
I. L. O'Sullivan, Jr.
Ironman Apartments
Jardines De Caparra Associates

Appendix A

Jeffrey Place, Ltd.
Jellico Towers, Ltd.
Kensington Heights, Ltd.
Kimberly Associates
Kingsport Gardens, Ltd.
LaGrange Meadows Limited Partnership
Lansing Gardens, Ltd.
Lebanon Senior Citizens, Ltd.
Liberty Commons, Ltd.
Linden Park, Ltd.
Los Laureles Apts. LDP
Lyndonsville Associates
Lynwood Terrace Company
Marilyn Smith
Marion Manor II Ltd.
Marion Manor Ltd.
Maryville Towers, Ltd.
Memphis Towers, Ltd.
Montserrate Associates
Monte De Oro Associates
Morningside Gardens, Ltd.
Mt. Morgan Ltd.
Murfreesboro Towers, Ltd.
New Center Associates
Normandale Apartments, Ltd.
North Park Apartments, Ltd.
Northcrest, Ltd.
Northwood Park, Ltd.
Oakwood Apartments
Overbrooke Hills, Ltd.
Owensville Commons, Ltd.
Ozark Manor Co.
Pam Apartments Associates
Park Place Associates

Appendix A

Parkwood Apartments Partnership
Parkwood Apartments Partnership Phase II
Patten Towers, Ltd.
Peppertree Apts., Ltd.
Piqua Manor, Ltd.
Plaza Manor, A Limited Partnership
Prattwood Apartments Co.
Preston Drive Limited Partnership
Rainbow Apartments
Ramsay II Associates
Richard Roy
Rickwood, Ltd.
River Oaks Associates
Riverside Associates
Roosevelt Manor, Ltd.
San Anton Associates
Selma Apartments Co.
Socorro Village Apartments
South Park, Ltd.
Southeastern Partners, Inc.
Southern Development Co., of Andalusia, Ltd.
Southern Development Co. of Moulton, Ltd.
Southern Development Co., of Oneonta, Ltd.
Southern Development Co. of Oneonta No., 2, Ltd.
Southern Development Co. of Piedmont, Ltd.
Southern Development Co. of Sylacauga, Ltd.
Southwood Gardens, Ltd.
Spring Hill Limited Partnership Community Management Corp.
St. Charles, Ltd.
Stanley Square A Limited Partnership
Staunton Commons, II, Ltd.
Stone Hill Limited Partnership Community Management Corp.
Stonehedge II, A Utah Limited Partnership
Stonehedge, WRP Limited Partnership

Appendix A

Stonewood Apts. Ltd.
Streetsboro Green, an Ohio Limited Partnership
Summit Towers, Ltd.
Suncook Pond Associates
Sundance Apartments Associates
Sunset Square, Ltd.
Swansboro Hill Limited Partnership Community Mgmt. Corp.
Tamarind Square, Ltd.
Tanglewood Apartments, Ltd.
Tera Gardens, ALP
The Charlestown Group
The Heights, LDP
The Hillsborough Group
The Housing Authority of the City of Allentown Pennsylvania
The Sussex Group
The Watauga Company
Torre De Tokio Ltd., Div. Partnership
Troy Manor, Ltd.
Turabo Limited Dividend Partnership
Valley View Associates
Vandalia Associates, Ltd.
Vega Baja LDP
Victoria Arms Apartments, Ltd.
Villa Park, Ltd.
Village East Associates
Village II, WRP Limited Partnership
Village Park, Ltd.
WAD Company
Washington Gardens Association
West Columbia Apartments Associates
Western Gardens Associates a California Limited Partnership
Westgreen Limited Partnership
Westwood Arms, A Limited Partnership
Westwood Village Apartments, A Texas General Partnership

Appendix A

William Henry Waldock
Willow Creek, Ltd.
Willowood Investment A Utah Limited Partnership
Wilshire Apts., a Limited Partnership
Windwood II Company
Winhaven Associates
York Apartments Company

Parties to the NLHA Action who are Stayed in Claims Court Pending Appeal

National Leased Housing Association
ADA Associates
Baldwin Villa Plaza
Beechcreek Ltd. (The Southcreek Company)
Blackduck Apartments
Cambridge Square, Ltd.
Casa Linda Del Sur Associates
Clinton Towers Ltd.
Detroit Lakes Park Manor Estates Ltd. Partnership
El Nido Apartments
Elmwood Apartments Ltd.
Eminence Village, Ltd.
Floodwood Associates
Gatewood Village Apartments
Glenbrook Park, Ltd.
Greentree, Ltd.
Greentree Village
Henry Hill Apartments Ltd.
Hillside Terrace
Housing Associates of Lancaster
Hunt Building Corporation
Indian Ridge Ltd.
Jackson Valley Ltd.
Lintero Apartments

Appendix A

Madison Hill Limited Partnership
Maple Grove, Ltd.
Mill Ponds View Apts.
Montgomery Manor Apartments
North Star Apartments
Northgate Village Apartments
Peppertree Acres Apartments
Pine Hill Partnership
Pine Ridge Apartments
Prall Place, Ltd.
Princeton Apartments
Red Pines Estates
Regency Park, Ltd.
Regency Park of Louisville, Ltd.
Reynolda Woodlawn Apts.
River Bend Apts. Ltd.
Riverside Manor
Robinwood Park
Sagebrush Apartments
Southside Manor
Springview Partnership
Sunnyview Square
Sunset-Normandie Towers, Ltd.
Sycamore Terrace, Ltd.
The Maryland Ltd. Partnership
The Oaks
Thief River Falls Elderly
Walnut Hill Ltd.
Westwood Ltd.
Whittier Apts. Ltd.
Wildwood Apts. Ltd.
Williamsburg Terrace, Ltd.
Windsor Place Partnership, Ltd.
Woodside Park, Ltd.

Appendix A

Jose Antonio Escajeda Apartments
College Manor, Ltd.
Sierra Vista Apartments
Bremerton Limited
Burnsville Partners Ltd.
Central Towers Limited
Clifton Limited
Coventry Associates
Fridley Apartments
Heritage Hill II
Innsbruck Limited Partnership
Northgate Plaza Ltd.
The Hylands Limited
West Falls Estates
Windsor Place, Ltd.
Zumbrota Towers Limited
Park View Terrace Apartments
Mt. Carmel Housing Partnership
Allison Village Associates
Uptown Village, Ltd.
Village East Towers

Supreme Court, U.S.
FILED
JAN 7 1993
OFFICE OF THE CLERK

No. 92-551

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 25, 1992
CERTIORARI GRANTED NOVEMBER 16, 1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

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JOINT APPENDIX

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The following opinions and orders have been omitted in printing this joint appendix pursuant to S. Ct. R. 26.1, because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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Opinion of the district court, *Acacia Villa* v. *Kemp* No. CV-90-390 MRP (Oct. 31, 1990)	40a-60a
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. 89-CV-1654

JUDGE BARBARA J. ROTHSTEIN

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

v.

JACK F. KEMP, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
11/9/89	1	COMPLAINT)Summons(es) issued) receipt no. 170198 (bb) [Entry date 11/20/89]
2/1/90	7	AMENDED COMPLAINT FOR DECLARATORY JUDGMENT (jg) [Entry date 2/5/90]
2/15/90	10	ANSWER by defendants (jg)
9/20/90	70	ORDER by Judge Barbara J. Rothstein GRANTING plaintiffs' motion for summary judgment and DENYING defendants' cross-motion for summary judgment. Court finds that Section 801 is unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment. cc cnsl. (mb)
9/21/90	71	JUDGMENT: Court finds Section 801 to be unconstitutional in that it violates plaintiffs' due process rights under the Fifth Amendment: plaintiffs' motion for summary judgment GRANTED; defendants' cross motion for summary judgment is DENIED. (cc: all counsel, jgm. book) (mb)

Date	No.	Proceedings
11/16/90	85	NOTICE OF APPEAL by defendants USA and Jack F Kemp from Dist. Court entered 9/20/90 granting pltfs' motion for summary judgment and denying defts cross-motion for summary judgment and from the judgment entered 9/21/90 [71-1] (cc: CCA, BJR, all counsel) (NS) [Entry date 11/19/90]
11/19/90	86	AMENDED NOTICE OF APPEAL [85-1] (NS)
4/16/91	95	ORDER by Judge Barbara J. Rothstein granting pltfs' motion for supplementary relief based upon declaratory judgment in part [90-1] (cc: all counsel) (rs) [Entry date 4/17/91]
4/30/90	96	NOTICE OF APPEAL by defendant USA, defendant Jack F Kemp from Dist. Court decision [95-1] (cc: CCA, BJR, all counsel) (mg) [Entry date 5/1/91]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV-90-0390-MRP

JUDGE MARIANA R. PFAELZER

ACACIA VILLA, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
1/25/90	1	Complt. Issd sms.
9/27/90	35	Crt grants ptlf mot for partial s.j. as to counts 1 & 10; Crt to prepare memo of decision or sign ord. M.O. C/r B Zaccaro
10/31/90	40	MEMO OF DECISION ths crt is bound by the 9th Circ constructn of the HAP contracts in Rainier View. HUDs failure to calculate the rent adjustmnts according to the AAAF formula is breach of those contracts. The crt concludes tht 801 is unconstitutional in tht it deprives pltfs of their property right to rent adjustmnts as provided in the HAP contracts w/out due process. etc; Pltf mo for partial s/j on counts I & X are granted. deft mo for s/j is denied. (ENT 10/31/90) mldc py&notic

Date	No.	Proceedings
10/31/90	41	FINAL JDMT&ORD final jdmt forthwith for ptlfs on counts I & X of the 1st A/C declaring tht ptlfs HAP contracts w/US Department of Housing & Urban Development require HUD to determine maximum rents each year by applying the automatic annual adjustmnt factor; & tht HUD's use of comparabilty studies to determine maximum rents for pltfs sectn 8 projects is a breach of HUDs obligation to determine maximum rents each year accoridng to the AAAFs; declar tht sectn 801 of the HUD reform Act of 1989 is null & void because it violates the Constitution of the US as more part discussed in the accompanying memo of decision; declar the frm the dte of ths judmt HUD is obligated to pay to pltfs future rent increases under pltf HAP contract determng by applying the AAAF to the contract rent wch would be in force as of the dte of the jdmt if HUD has applied the AAAF factors in the past w/out comparability studies. (ENT 10/31/90) MD JS-6 mld cpy&notc
11/15/90	42	Notc of mot&Mot deft rl 59(e) mot to amend jdmt; memo of p/a/ decalr of Linda D Cheatman; James J Tasha, &david Shenk. retnbl 1/7/91 10:00 am deft
1/14/91	44	Crt denies mot to amend jdmt; cnsl for pltf to prepare ord. M.O. c/R B Zaccaro
3/7/91	47	Defts fld. NOTC OF APPEAL to 9th CCA frm jdmt ent 10/31/90. Fees waived. Ptys srved: Molly Munger, Lori Martin

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 91-35267

ALPINE RIDGE GROUP, ET AL.

v.

JACK F. KEMP, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
3/16/91		DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL * * *
2/7/92		FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. J.C. Wallace, author; Proctor R. HUG; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [91-25267, 91-35573, 91-55354 * * *
5/29/92		FILED ORDER (J.C. Wallace, Protor R. HUG, Pamel A. RYMER,): denying petition for enbanc rehearing * * *
6/9/92		MANDATE ISSUED * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55354

ACACIA VILLA, ET AL.

v.

JACK F. KEMP, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
3/21/91		DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL * * *
4/9/91		Filed Order CONFATT (KWM) these CASES 91-35267 & 91-55354 are consolidated by order[.] * * *
2/7/92		FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. J.C. Wallace, author; Proctor R. HUG; Pamela A. RYMER.) FILED AND ENTERED JUDGMENT. [91-35267, 91-35573, 91-55354 * * *
5/29/92		FILED ORDER (J.C. Wallace, Proctor R. HUG, Pamel A. RYMER,): denying petition for enbanc rehearing * * *
6/9/92		MANDATE ISSUED * * *

[SECURITY AGREEMENT]

This Security Agreement Relating to Section 8 Payments, entered into the 23rd day of August, 1979, by and among Homestead Associates, a Washington Limited Partnership organized and existing under the laws of the State of Washington (the "Mortgagor"), Washington Mortgage Co., Inc. (the "Mortgagee"), Seattle, Washington, the Department of Housing and Urban Development of the United States of America ("HUD"), and the Housing Authority of the County of King, a public body corporate and politic (the "PHA").

WITNESSETH:

WHEREAS, the Mortgagor is the owner of certain real property upon which there is to be erected a housing development designed for occupancy by persons and families of low income consisting of 26 dwelling units on a site located at 108th Avenue S.E. and S.E. 208th in the City of Kent, Washington ("Project"); and

WHEREAS, the Mortgagee is about to make a mortgage loan to the Mortgagor for the development of the Project pursuant to a mortgage note ("Mortgage Note") and a mortgage or deed of trust ("Mortgage") executed as of August 1, 1979, and other related documents executed by the Mortgagor and the Mortgagee (collectively referred to herein as the "Loan Documents"); and

WHEREAS, in order to raise funds to purchase said mortgage loan pursuant to the Mortgage Note and Mortgage and to provide permanent financing for the Project, The Housing Finance Corporation of Washington (the "Corporation") is about to issue its Tax Exempt Note, Series 1979B (Homestead Apartments Project) ("Note") in the principal amount of $722,592 issued pursuant to that certain Agreement for Financing with Tax-Exempt Obligations between the the Mortgagor, the Mortgagee,

the Issuer, Olympic Bank and Unigard Insurance Company, dated August 23, 1979, (the "Agreement"); and

WHEREAS, pursuant to the provisions and requirements of Section 8 of the United States Housing Act of 1937, as amended ("Section 8"), the United States Department of Housing and Urban Development ("HUD") has approved the Mortgagor as the developer of the Project; and

WHEREAS, under Section 8 and the regulations promulgated thereunder the following agreements, among others, have been, or will be, entered into with regard to the Project:

(a) An Annual Contributions Contract (ACC) between HUD and the PHA relating to the Housing Assistance Payments Contract described in subparagraph (c) hereof; and

(b) An Agreement to Enter into Housing Assistance Payments Contract ("Section 8 Agreement") between the PHA and the Mortgagor; and

(c) As provided in the Section 8 Agreement, a Housing Assistance Payments Contract ("Section 8 Contract") between the PHA and the Mortgagor.

WHEREAS, under the Section 8 Contract, the PHA will make housing assistance payments ("Housing Assistance Payments") to the Mortgagor for the benefit of eligible tenants (as defined in the Section 8 Contract) leasing units in the Project; and

WHEREAS, the Section 8 Agreement and the Section 8 Contract are hereinafter collectively referred to as the "Section 8 Contracts";

NOW, THEREFORE, the parties hereto hereby agree as follows:

(1) As security for the performance of all obligations of the Mortgagor under the Loan Documents, and as security for the performance of all of the obligations of the Mortgagor under the Section 8 Contracts, the Mortgagor pledges and assigns to the Mortgagee a security interest ("Security Interest") in all amounts payable under the Section 8 Agreement, the ACC and the Section 8 Contract, respectively, in accordance with their terms.

(2) Unless and until the Mortgagee has given notice to the Mortgagor that either (a) it deems itself insecure, or (b) default has occurred under the Loan Documents, the Mortgagor shall evercise all of its rights under the Section 8 Contracts except Mortgagor will not amend, modify or terminate the Section 8 Contracts.

(3) After giving notice to the Mortgagor that the Mortgagee deems itself insecure or that default has occurred under the Loan Documents, it may, in its sole discretion, exercise any or all of the Mortgagor's rights to payments under the Section 8 Agreement and Section 8 Contract. To further aid the Mortgagee in enforcing its Security Interest hereunder, HUD and the PHA agree that upon receipt of a copy of the notice provided for in this paragraph, all payments which would otherwise be made to the Owner under the Section 8 Contract shall be paid directly to the Issuer. This right of the Issuer shall be in addition to, and not in substitution for, any rights it may have under the Loan Documents and the rights it may have as a secured party under the Washington Uniform Commercial Code.

(4) To aid the Mortgagee in enforcing its Security Interest hereunder, the Mortgagor agrees that:

(a) The Mortgagee and its agents or employees are hereby empowered as Mortgagor's attorneys-in-fact, irrevocably while the Mortgage Note is unpaid, and with power of substitution, to do all acts and things which the Issuer may deem necessary or expedient to perfect, protect and enforce the Issuer's Security Interest, including, but not limited to:

(1) Signing Mortgagor's name on and filing financing statements and other notices under law; and

(2) Subject to the approval of HUD, executing any assignments or other instruments or transfer respecting the Section 8 Contracts after any default under the Loan Documents; and

(3) Performing any obligation of the Mortgagor under the Section 8 Contracts; and

(b) The Mortgagor will execute financing statements whenever requested to do so by the Issuer.

(5) The Mortgagee shall have the right to enforce this Agreement and the rights of the Mortgagor assigned to the Mortgagee as secured party, notwithstanding any default or failure of performance by HUD under the Section 8 Contracts.

(6) To the extent consistent with Section 8 and the regulations promulgated thereunder, this Agreement shall be governed by, and construed in accordance with, the laws of the State of Washington.

(7) The Mortgagee may assign its rights hereunder to the Corporation and the Corporation may pledge all rights under such assignment as additional security for its Tax Exempt Note.

HOMESTEAD APARTMENTS, a limited partnership
By: Delta One Limited, a Washintgon
Corporation As its: General Partner

Dated 8/21/79 By /s/ [Illegible]
Duly Authorized Agent
DONNA D. DIXON, President

WASHINGTON MORTGAGE CO., INC.

Dated 8/21/79 By /s/ Carol P. Hanson
Vice Pres.

SECRETARY OF HOUSING AND URBAN DEVELOPMENT, acting by and through the Federal Housing Commissioner

Dated Aug. 23, 1979 By /s/ [Illegible]
As its Authorized Agent

HOUSING AUTHORITY OF THE COUNTY OF KING

Dated 8/21/79 By /s/ Jim Wiley
Executive Director

[LETTER FROM E.J. MOGER TO DAVID L. BELLER]

August 23, 1979

In Reply Refer To: 10.3G

Mr. David L. Beller
Preston, Thorgrimson,
Ellis, Holman & Fletcher
2000 IBM Building
Seattle, Washington 98101

Dear Mr. Beller:

Subject: Homestead Apartments Project
The Housing Finance Corporation of
Washington
HUD Project No. WA19-0048-001

We have reviewed copies of the documents identified in Exhibit A, attached hereto, in connection with the proposed issuance and sale by The Housing Finance Corporation of Washington (the "Issuer") of its $716,800 principal amount of Tax Exempt Note (Homestead Apartments Project) to provide interim and permanent financing for the Project. I hereby make the following determinations pursuant to the provisions and requirements of 24 CFR Part 811, Subpart A, published in the Federal Register on August 3, 1977:

(1) The Housing Authority of the County of King (the "Authority") is hereby found and determined to constitute and is approved as a "public housing agency" within the meaning of Section 3(6) of the United States Housing Act of 1937, as amended (the "Act"), pursuant to 24
(2) The Issuer is hereby found and determined

(2) The Issuer is hereby found and determined to constitute and is approved as an "agency or instrumentality" for purposes of 24 CFR Part 811, Subpart A, pursuant to 24 CFR Section 811.105;

(3) The Authority and the Owner have executed an Agreement to Enter into a Housing Assistance Payments Contract in connection with the Project;

(4) The Note, when and if issued in acoerdance with the documents identified in Exhibit A, will be issued in connection with a low-income housing project approved by HUD and in compliance with the Act and applicable regulations;

(5) The Note in the amount of $716,800 does not exceed the maximum amount of permanent obligations eligible for tax exemption in connection with the Project, as required by 24 CFR Section 811.106;

(6) The Note in the amount of $716,800 does not exceed the maximum amount of interim obligations eligible for tax exemption in connection with the Project, as required by 24 CFR Section 811.108;

(7) The term of the Note is acceptable to HUD and is found to be in accord with 24 CFR Section 811.108;

(8) The term of the Housing Assistance Payments Contract for this project will not exceed the maximum allowable under 24 CFR Section 811.106(b);

(9) The interest rate of 7.25% per annum on the Note during the interim period and of 7.35% per annum for the permanent loan are hereby approved as reasonable and found to satisfy

24 CFR Sections 811.108 and 811.106, respectively;

(10) The use of proceeds of the obligation is consistent with the uses permitted by 24 CFR Sections 811.107 and 811.108; and

(11) All of the provisions in the documents identified in Exhibit A are satisfactory and acceptable to HUD in compliance with approved HUD regulations.

Based on the above determinations and the approval of the final approval for this Project, the terms and conditions of the financing are approved.

Based on these determinations, we have concluded that the Issuer's Note identified above when issued in accordance with the above-described documents, shall constitute an obligation in accordance with Section 11(b) of the United States Housing Act of 1937, which provides that: (1) "obligations, including interest thereon, issued by public housing agencies in connection with low-income housing projects shall be exempt from all taxation now or hereafter imposed by the United States whether paid by such agencies or by the Secretary." (2) "The income derived by such agencies from such projects shall be exempt from all taxation now or hereafter imposed by the United States."

Pursuant to Section 811.110, this notification of approval of tax exemption shall not be subject to revocation by HUD.

Sincerely,

/s/ E. B. Moger
E. B. MOGER
Area Manager

Attachment

Exhibit A

1. Agreement between Housing Authority of County of King, (Authority), and Housing Finance Corporation of Washington, (HFC) dated March 20, 1979.
2. Authority Resolution No. 1356, dated April 18, 1978, authorizing Agreement with HFC.
3. Articles of Incorporation of HFC filed April 24, 1978, and Amended Articles of HFC filed April 20, 1979.
4. By-Laws of HFC.
5. Agreement for Financing with Tax-Exempt obligations dated August 23, 1979, not-fully-executed copy received August 21, 1979.
6. HFC Resolution No. 9, dated June 21, 1979, authorizing issuance of note.
7. Authority Resolution No. 1435, dated June 19, 1979, and Authority Resolution No. 1451, dated August 21, 1979, approving financing plan.
8. Pledge Agreement between HFC and Washington Mortgage Co., Inc.
9. Building Loan Agreement dated August 1, 1979.
10. Mortgage Note dated August 1, 1979.
11. Mortgage dated August 1, 1979.
12. Security Agreement Relating to Section 8 Payments, executed by HUD on August 23, 1979.
13. HFC Certification as to Projected and Actual Financing Terms, dated August 21, 1979.
14. Opinion of Preston, Thorgrimson, Ellis, Holman and Fletcher that HFC satisfies requirements of 24 CFR 811.105(a), dated August 21, 1979.
15. Draft of Assignment and Declaration by Washington Mortgage Co., Inc., received August 21, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-16542

ALPINE RIDGE GROUP, *et al.*

v.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. *Declaratory Judgment.* This is an action for a declaratory judgment under 28 U.S.C. § 2201 to determine the legal rights of the parties in the actual controversy described below.

2. *Speedy Hearing.* Plaintiffs request a speedy hearing pursuant Fed. R. Civ. P. 57.

3. *Jurisdiction.* This is a civil action arising under the Constitution and laws of the United States. Jurisdiction is vested in this Court under 28 U.S.C. § 1331.

4. *Venue.* Venue is proper in this district under 28 U.S.C. § 1319(e) because certain of the named plaintiffs reside in this district, their contracts were entered into and are administered in this district by the Department

of Housing and Urban Development ("HUD"), the real estate affected by those contracts is located in this district, and their causes of action arose in this district.

CLAIM FOR RELIEF

5. *Section 8 Statute.* Under Section 8 of the National Housing Act, 42 U.S.C. § 1437(f) ('Section 8 Statute"), Congress established a program to provide subsidized housing for the elderly, handicapped, and poor.

6. *HAP Contract.* Each of the plaintiffs entered into a Housing Assistance Payment contract ("HAP Contract") with HUD or its agent under which plaintiffs constructed or substantially rehabilitated housing units and rented them to the elderly, handicapped, and poor. The HAP Contract specified the initial rents and provided for an automatic annual adjustment of the allowable rents based on factors to be determined and published by HUD ("Factor Rent Adjustments"). The tenant paid a portion of the rent based on the tenant's income, and the balance of the rent was paid by HUD directly to the owner. All of the contracts and projects involved in this action are described in Exhibit "A" attached hereto.

7. *Denial of Factor Rent Adjustments.* HUD has refused to grant Factor Rent Adjustments to plaintiffs, claiming that the Section 8 Statute and HAP Contract permit HUD to use individual rent comparability studies as an independent method of determining rent adjustments.

8. *Ninth Circuit Decision in Rainier View.* In *Rainier View Associates v. United States of America*, 848 F.2d 988 (9th Cir. 1988), *cert. denied* 109 U.S. 2065 (1989), the Ninth Circuit ruled that the Section 8 Statute and HAP Contract unambiguously provide that the Factor Rent Adjustment method is the exclusive method of adjusting rents, and that rent comparability studies can only be used by HUD in determining the applicable factors.

9. *HUD Represented That It Would Comply.* HUD represented to the Ninth Circuit that it would acquiesce in the *Rainier View* case in the Ninth Circuit when and if certiorari was denied. As part of its representation, HUD requested the Ninth Circuit to vacate an injunction in *Rainier View* granting relief to nonparties, on the grounds that such relief was unnecessary. See page 3 of HUD's Petition For Limited Rehearing in the *Rainier View* case:

> "The beneficiaries of these orders (certain nonparties) now have no need for the procedural rulings which would be vacated because they have the benefit of the precedential affect of a *substantive* ruling by this court in another appeal in this same case. Indeed, this was the very reason this court held the instant appeal moot."

By letter dated May 15, 1989, a copy of which is attached as Exhibit "B," HUD again requested that the injunction granting relief to nonparties be vacated on the grounds stated in HUD's original Petition For Limited Rehearing (i.e., that nonparties would be granted relief without the necessity of further legal action). Based on those representations, the Ninth Circuit vacated the lower court's injunction (see Order attached as Exhibit "C").

The Supreme Court denied HUD's petition for certiorari in the *Rainier View* case on May 15, 1989. On May 19, 1989, HUD issued a memorandum directing its field offices in the Ninth Circuit to comply with the *Rainier View* decision. A copy of HUD's memorandum is attached to this complaint as Exhibit "D".

10. *Plaintiffs Relied On HUD's Representation.* Relying on HUD's representations, which had been communicated to plaintiffs, plaintiffs did not take further legal action to assure compliance by HUD with the *Rainier View* decision.

11. *HUD Reneges On Its Representations.* Contrary to its representations to the Ninth Circuit and to the plaintiffs, HUD has failed to apply the *Rainier View* de-

cision to other projects in the Ninth Circuit. Instead, HUD secretly drafted and lobbied for, and Congress has enacted, legislation attempting to retroactively and prospectively repudiate HUD's obligation to make full rent adjustments on the basis set forth in the *Rainier View* case. The legislation referred to is Section 801 of HR1, signed by the President on December 15, 1989. The legislation:

> (a) Constitutes a taking without just compensation, in violation of the Fifth Amendment to the United States Constitution;
>
> (b) Constitutes a deprivation of property without due process of law, in violation of the Fifth Amendment;
>
> (c) Constitutes a questioning of the public debt in violation of Section 4 of the Fourteenth Amendment.

JUDGMENT SOUGHT

Plaintiffs pray for judgment as follows:

1. *Declaratory Judgment.* A declaration: (a) that the Section 8 Statute and HAP Contract require HUD to grant Factor Rent Adjustments to plaintiffs; (b) that Section 801 of HR.1, PL.101-235, is unconstitutional; and (c) HUD is estopped by its conduct from asserting Section 801 of HR1 as a defense to this action.

2. *Attorneys' Fees.* An award of plaintiffs' attorneys' fees and costs in this action.

3. *Other Relief.* Such other relief as the Court may deem proper.

DATED this 31st day of January, 1990.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM
WARREN J. DAHEIM
WSBA No. 03992
JOHN C. GUADNOLA
WSBA No. 15198
DONALD W. HANFORD
WSBA No. 05948

By: _____
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALPINE RIDGE GROUP, *et al.*

v.

JACK F. KEMP, *et al.*

DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

[Filed Feb. 15, 1990]

Defendants, the United States Department of Housing and Urban Development ("HUD") and Jack F. Kemp, Secretary of HUD, answer plaintiffs' Amended Complaint filed in the above-captioned case as follows:

FIRST DEFENSE

The Court lacks subject matter jurisdiction over the claims brought in this action.

SECOND DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

THIRD DEFENSE

In response to the numbered paragraphs of the Amended Complaint, defendants answer as follows:

JURISDICTION AND VENUE

1. This paragraph contains plaintiffs' characterization of this suit to which no answer is required, but if an answer is required, it is denied.

2. This paragraph contains a request to the Court to which no answer is required.

3-4. The allegations in these paragraphs constitute conclusions of law to which no answer is required, but insofar as an answer may be deemed required, they are denied.

CLAIM FOR RELIEF

5. This paragraph contains a characterization of 42 U.S.C. § 1437(f), to which this Court is respectfully referred for a full and accurate statement of its contents.

6. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph, except to admit that each of the plaintiffs entered into a Housing Assistance Payments ("HAP") contract with HUD or a Public Housing Agency, and except to the use of the term "sought" by plaintiffs, which constitutes a conclusion of law to which no answer is required, but insofar as an answer may be deemed required, it is denied. Defendants deny the second sentence of this paragraph. Defendant's admit the third sentence of this paragraph. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence, except to admit that a document described as Exhibit "A" is attached to the complaint filed in this matter.

7. Denied.

8. The first sentence of this paragraph contains plaintiff's characterization of a Ninth Circuit Decision, to which this court is respectfully referred for a full and accurate statement of its contents. *Rainier View Associates v. United States of America*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 2065 (1989).

9. The first and second sentence of this paragraph contain a characterization of HUD's Petition For Limited Rehearing in *Rainier View Associates* to which this court is respectfully referred for a full and accurate statement of its contents. The third sentence of this paragraph contains an excerpt from HUD's Petition For Limited Rehearing, to which this court is respectfully referred for a full and accurate statement of its contents.

The fourth sentence of this paragraph contains plaintiffs' characterization of a letter dated May 15, 1989, and attached to the Amended Complaint as Exhibit "B", to which this court is respectfully referred for a full and accurate statement of its contents. The fifth sentence of this paragraph contains a characterization of a Ninth Circuit Order attached to the Amended Complaint as Exhibit "C", to which this court is respectfully referred for a full and accurate statement of its contents.

Defendants admit the sixth sentence of this paragraph. The seventh sentence of this paragraph contains plaintiff's characterization of a HUD memorandum dated May 19, 1989, to which this court is respectfully referred for a full and accurate statement of its contents. Defendants admit that a copy of a HUD memorandum dated May 19, 1989, is attached as Exhibit "D."

10. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

11. Defendants deny the first sentence of this paragraph, and further aver that Title VIII of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (Dec. 15, 1989) governs HUD's authority to extend the *Rainier View* decision to non-parties. Defendant's deny the second sentence of this paragraph, except to admit that Congress enacted Title VIII of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (Dec. 15, 1989), to which this Court is respectfully referred for a full and complete statement of its contents. Defendants deny the third sentence of this paragraph, except to admit that the President signed the Act, which contains section 801, on December 15, 1989. The fourth sentence of this paragraph

constitutes conclusions of law to which no answer is required, but insofar as an answer may be deemed required, they are denied.

JUDGMENT SOUGHT

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Title Omitted in Printing]

AFFIDAVIT OF DEAN CHAUSSEE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KINGS)

Dean Chaussee, being first duly sworn, on oath, deposes and says:

This affidavit is submitted in support of plaintiff's Motion for Summary Judgment.

1. I have been in the business of developing and building apartments and homes for more than 25 years. I am a registered Apartment Manager, a designation given by the National Association of Home Builders. I am also a Director of the National Association of Home Builders and of the National Leased Housing Association.

2. I developed, financed, and built some 12 projects in the 1970's under the Section 8 Program, all in response to HUD's Notification of Funding Availability and all financed without using FHA insured loans. I am fully familiar with the Section 8 Program having been one of the original participants involved in Section 8 Projects over the past 15 years.

3. Section 8 was adopted August 22, 1974, as part of the Housing and Community Development Act of 1974. "Section 8" refers to the fact that, in the 1974 Act, a new Section 8 was incorporated into the United States Housing Act of 1937. It created a new form of public housing, owned and operated by private developers. A

better understanding of Section 8 can be had by a short explanation of two earlier programs. Those two earlier programs are Section 23 and Section 236 of the Housing Act.

4. Section 23 was a 1965 Public Housing Program under which units were rented by public housing authorities from private owners and sublet to qualified tenants. In 1974, HUD amended Section 23 Regulations to provide that the owner would lease his units directly to qualified tenants. The Public Housing Authority would subsidize the rents by directing assistance payments to the owner. Under the revised program, the owner was to take the risk of occupancy (instead of the government) and was to manage the units. New construction regulations provide for long term contracts between owners and housing authorities, with automatic annual adjustments and rents on the basis of the Bureau of Labor Statistics Index of rents for those localities for which the Bureau of Labor Statistics published rents. Regulations were drafted by a task force headed by Joseph Burstein, Chief Counsel of the Assisted Housing Section. There was some feeling that the regulations went beyond the statutory authority of the 1965 Act. For that reason, HUD proposed a new revised Section 23, following the outline of the revised regulations. A new act was enacted as Section 8. The old Section 23 was left in place for existing projects in the pipeline and covered the contingency that Section 8 might prove unworkable. The formula approach used in the revised Section 23 program was the predecessor of the formula approached ultimately used in Section 8.

5. Section 236 was enacted in 1968. It was designed to provide new or rehabilitated rental and cooperative housing for lower income families. The program combined federal mortgage insurance with subsidized interest payments to mortgagees (lenders) in order to reduce the mortgagor's (owners) monthly mortgage payment. The interest payment subsidy lowers the effective interest rate of the mortgage to one percent. The benefits of

the reduced interest payments were to be realized by the tenants of the project in the form of lower rents.

As originally enacted, the Section 236 Program was meant to stimulate housing production by making private industry the primary vehicle for providing shelter for low and moderate income families. Under Section 236, rents were adjusted by HUD under a project-by-project expense analysis which attempted to give increases for costs plus a limit of six percent return to the owner. The delays in the rent adjustment process, and the fact that interest subsidies were never increased, resulted in vacancies and cuts in services to tenants. Ultimately, many Section 236 projects defaulted when income provided insufficient funds to pay operating costs. Section 236 was suspended during the 1973 subsidized housing moratorium and has never been revised as an active production program. In 1974 HUD formed a special task force to deal with defaults under Section 236 projects and make appropriate recommendations to Congress.

6. In 1974, the federal government's housing programs for the poor were in chaos. High-rise public housing had turned into crime infested ghettos. As costs increased, the government simply had to pay the cost or be faced with bankruptcy of public housing agencies or the prospect of having to take over the administration of local programs and projects. Section 236 projects were likewise a disaster. Section 8 was passed in response to the failings of these programs.

7. It is clear that neither Congress nor HUD wanted a project-by-project rent adjustment process similar to 236 when it enacted the Section 8 Program. That has been admitted by the highest officials in HUD. See, for example, the deposition of James Tahash, head of the Program Planning Division in the HUD Office of Multi-Family Housing Management. Mr. Tahash's deposition was taken by the plaintiff in the Rainier View case on February 23, 1984, in Washington, D.C. Mr. Tahash clearly stated that Congress did not intend the program

to be in any way similar to Section 236. At page 67 to 68 of his depositions, questions and answers went as follows:

"Q. Because if you did a project-by-project analysis cost then you would be right back in the 236 program.

A. Yes, sir.

Q. And it's pretty clear Congress did not intend this program to process rent adjustments the way they were doing then under Section 236.

A. Or under the FHA rent formula. The 236 is the FHA rent formula.

Q. Right, and the rent formula is a project-by-project analysis.

A. Yes, sir.

Q. And once again, I'm pretty clear Congress didn't want you to follow the rent formula.

A. Yes, sir.

Q. Do you know why that was? . . .

A. I believe that number one, the Department did not want to do it because of the fact that they did not want to go into it. When we proposed the regulations, they were trying to make this a market, conventional market program, partially assisted. They did not want it to be insured, and they did not want the staff intensive work required in the insured programs. They wanted this program to be a less staff intensive program.

And therefore, what they wanted to do is set it up in such a way so that the rents could be adjusted using a rent formula, but that they did not want to get into a staff intensiveness by doing a project-by-project rent determination."

On Page 25 of Tahash's deposition:

A. "It may be an unfortunate selection of words, but the object was not to say it was profitable to the

owers, but rather that they do not have to hire HUD to process rents, as we do under rent process, and make it clear under the Regs, that they did not have a process of rents as we did for rent prgorams; that their rents will be adjusted for the annualization.

Q. You were trying to make it simple?

A. Yes, and it may have been an unfortunate choice of words."

8. The Section 8 Program was simple. All the failings of public housing (operated by the public sector) and the Section 236 Program (operated by the private sector, but with no inflation edge) were to be avoided. Under Section 8, HUD aggressively solicited private developers to submit proposals to design, construct, and operate specialized housing for targeted social groups at locations picked by HUD. If a developer's proposal was selected, HUD and the developer entered into a Housing Assistance Payment (HAP) Contract. Under the HAP Contract, rents were agreed upon in an amount high enough to induce the developer/owner to participate in the program. The developer/owner was to collect a portion of the rent (originally 25% but later increased to 30% of the tenant's income) directly from the tenant, while the remainder was to be paid to the owner by HUD either directly or through a local public housing agency as a contract administrator.

9. In early March of 1975, I attended an in depth briefing of the Section 8 program at the National Association of Home Builders (NAHB) headquarters in Washington D.C. This briefing was jointly sponsored by NAHB and HUD. Larry Simons, then FHA Commissioner and Deputy HUD Secretary for Housing, presented the view from HUD. He presented the Section 8 Program as a program completely devoid of the problems of the failed Section 236 Program in that HUD would have the private sector develop, own, manage and conventionally finance projects with HUD supplying tenant subsidy by way of a

project contract. The key factor to be considered according to Simons, was that HUD would not interfere with the project income but would make automatic annual adjustments to the rental rate. The automatic adjustment would be based on published factors for selected geographic areas. The program, as presented by Simons and in the published material, was of interest to many developers/builders who could visualize a method of accomplishing two goals in a given project: house low income tenants in scattered projects without typical HUD interference, and, since the program was profit motivated, to potentially make a businesslike profit while providing this necessary housing.

10. The key to understanding the Section 8 Program is the fact that its purpose was not to build marketing housing. The market had not produced, and was not going to produce, the type of housing at the locations that HUD wanted. For example, over seventy percent of the Section 8 housing eventually built was designed for the low income elderly. It mirrored market rate retirement housing in design, services (except for meal service), and tenant population. It differed in being located in rural areas (which could not support market rate retirement housing) or on prime downtown building sites. It also differed in that rents charged in Section 8 elderly projects were almost uniformly lower than rents charged in structurally comparable market retirement housing.

A comparison of Section 8 elderly and market rate retirement housing is as follows:

Zoning: Developers of Section 8 housing invariably faced bitter zoning battles, not encountered by market rate retirement housing.

Location: The geographic areas designated by HUD for Section 8 elderly projects generally fell into two categories: An area or locale where no prudent, private developer would develop housing due to local income levels, or an expensive downtown site on prime commercial

property. By comparison, market rate housing for the elderly could be located wherever the owner chooses, which in most cases would not be in rural areas or an expensive downtown location.

Design: Section 8 elderly housing, like market rate retirement housing, is designed to meet the needs of a highly targeted tenant group. Some of the design features include lobbies and wide interior corridors, managerial spaces, elevators, wheelchair accessibility, fire rating and alarm systems, emergency call systems, security systems, dining and multi-purpose areas, and other specialized elderly safety features.

Building Costs: Davis-Bacon wage requirements and HUD red tape increased section building costs substantially.

Tenant-Population: The tenant population of Section 8 elderly housing must be 62 years of age or older, handicapped, or disabled. Like market rate retirement housing, the average age of tenants in Section 8 elderly projects is 80 years. In addition to the special problems posed by the elderly, Section 8 projects must also house the handicap and the disabled regardless of age. The disabled category includes those who are mentally impaired, those with drug and alcohol problems, and those with AIDS. The tenant population creates huge management problems which are expensive to solve. HUD grants no extra compensation for solving those problems.

Management: Government regulations, red tape, and paper work add substantially to the cost of managing a Section 8 project. Over the years the paper work has continued to increase as HUD requires more and more reports.

Financing: Conventional financing for Section 8 new construction projects was extremely difficult to obtain. Most lenders were leery of any government program on the theory that the government could not be trusted. When conventional financing was slow to develop, HUD

promoted what was called Section 11(b) financing. Section 11(b) financing was a program to grant tax exemption to the income on bonds or notes issued by a public housing agency in connection with development of Section 8 projects. The HAP contract was the security for the bonds. HUD bond experts again put on seminars trying to induce the lending community to finance projects that the goverment itself refused to finance.

To induce the private developers to build and the lenders to finance Section 8 housing, Congress authorized HUD to make annual inflation rent adjustments. This was to be done by either an annual market survey, or by a formula. To further induce the private sector to use Section 8, and to avoid costly and complicated procedures, HUD elected a formula inflation adjustment consisting of automatic adjustment factors. To further induce private developers like myself to invest in Section 8 housing, HUD inserted typical bond language into the Section 8 Contracts and I relied on that language which states as follows:

> 1.6 *Government Assurances to Owner.* The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and that funds have been obligated by the government for such agreements.

HUD's attempts to "sell" the Section 8 new construction program to developers and lenders went to extreme lengths. HUD put on a number of seminars, many of which I attended. Local HUD officials contacted developers to ask if they would be interested in developing under the program. Repeated assurances were given that this program would be unlike other previous government programs that had been over regulated.

11. The initial rents agreed to between HUD and the developer/owners were not market rents. Initial rents

were simply the rents HUD felt it had to pay developers to induce them into the program. In the Rainier View case, the deposition was taken of Ray Bradley, Seattle HUD Director Development, who dealt with all of the owners in the area on new construction projects under Section 8 from the Seattle Office. (Page 26 of deposition:)

> "Q. The original rents that were sent they were in most cases above market, were they not?
>
> A. Yes, they were."

At p. 29:

> "Q. Your office had certain production goals, is that correct?
>
> A. That is correct.
>
> Q. Basically to meet those goals you had to interpret the object and purpose of the program, is that correct?
>
> A. That is correct.
>
> Q. In so doing the rent reasonableness test became a means of justifying the rents necessary to make these projects feasible.
>
> a. Basically, yes."

Likewise, the deposition was taken in the Rainierview case of Lynn Stowell, HUD Director, Housing, at page 36:

> "Q. The original contract rents were not market rents, I take it, but something in excess of market?
>
> A. Yes.

Likewise, Mr. James Tahash from Washington D.C. testified under deposition in the Ranier View case that the original rents were basically negotiated rents (see page 54 of his deposition):

> "Q. The annual rent is negotiated rent in new construction, is it not?
>
> A. We both will agree that that is not necessarily the comparable rent for that area."

12. To induce the private sector to build Section 8 projects, HUD elected to use automatic annual rent

adjustments. Commencing in 1976, HUD published annual adjustment factors in the federal register. Those factors were used for two purposes. They were used to arrive at new fair market rents for existing housing. Second, they were used to make adjustments under new construction contracts. The factors were based on the CPI for the previous twelve months for rents and utilities in the various SMAs and districts. For each SMA and census region, a single factor was developed for adjusting contract rents, excluding utilities. A matrix of 105 separate factors reflecting differences for various rent ranges and bedroom sizes was developed for adjusting the rents on units including utilities.

Until 1981, with possibly a few minor exceptions, the factors were applied automatically to the entire contract rent on the contract date. At the time of each adjustment the owner and HUD would enter into an addendum setting forth the new contract rent.

The decision to use the CPI was made by the policy division of HUD. At the time it was adopted, HUD felt that there was no other reliable index which could be used. To date, the CPI is an accurate measure of market rate increases in the various areas.

In 1982, HUD published factors based on a combination of the CPI and the annual housing survey. The selection was made by the economic division of HUD.

Prior to 1981, with the possibility of a few exceptions, HUD field offices throughout the United States uniformly granted annual rent adjustment for Section 8 new construction projects using the rent process described at 24 CFR Part 888, subpart B in effect at that time.

Since 1981, some HUD field offices have conducted project-by-project comparability surveys on individual Section 8 projects within their jurisdiction. A survey performed by the Office of Inspector General of HUD during the period July 10, 1981, to September 20, 1982, covering Regions I, IV, V, and VIII disclose that in seven of the

eight field offices where comparability studies were performed, two different methods were used.

The September, 1983 telephonic survey of all 54 field offices of HUD which are responsible for administering the Section 8 program for Section 8 projects within their jurisdiction, summarizes which of the field offices were then conducting some type of comparability reviews. There is no assurance that further investigation would not reveal more variances than are indicated in the survey.

The survey identifies at least two different processes for conducting comparability surveys, although there may be more. There is no assurance that these processes are uniformly followed for all Section 8 new construction projects in any one field office.

13. In summary, Section 8 was designed as a program for the private sector to take over the government's responsibility to house the homeless. The attraction to the program was that not only would developers be performing a valuable social service, but they had a chance to make profits if they watched their costs. I along with other developers have performed our part of our contracts and HUD has consistently attempted to back out of its obligations under the contract.

DATED this 3rd day of April, 1990.

/s/ Dean Chaussee
DEAN CHAUSSEE

DECLARATION OF JONA GOLDRICH

I, JONA GOLDRICH, declare as follows:

1. I, Jona Goldrich, am a general, and in some instances, also a limited partner, of each of the 59 of the plaintiff partnerships. Except as otherwise noted, the facts set forth in this affidavit are known personally by me. I am authorized to submit this affidavit on behalf of each of the plaintiff partnerships.

2. Each of the plaintiffs is a California general or limited partnership.

3. In the early 1970s, I and various partners in the plaintiff partnerships participated in HUD's Section 221 (d) (3) and Section 236 low-income housing programs, which preceded the Section 8 program. Indeed, I participated as a partner in at least 50 such projects. Although the low interest mortgages for Section 221 (d) (3) and Section 236 projects remained constant, the annual operating costs of the projects escalated dramatically and for a variety of reasons, including the complicated and time-consuming procedure HUD utilized in reviewing developers' requests for rent increases, as well as the fact that HUD's procedures ultimately resulted in the utilization of outdated cost data, the Section 221 (d) (3) and Section 236 projects did not yield developers a fair annual rate of return. Because of our negative experiences with the delays and extraordinary administrative inconveniences associated with case-by-case adjustments, we participated in the Section 8 program only because the Section 8 HAP contracts, unlike the Section 221 (d) (3) and Section 236 program contracts, provided for rent adjustments to be computed at least annually according to an equitable, timely and simplified formula to be published in the *Federal Register*. We also agreed to participate in the Section 8 program because the Section 8 HAP contracts and the Section 8 enabling regulations, unlike the Section 221 (d) (3) and Section 236 programs,

did not purport to limit artificially the developer's return on equity. Thus, when we entered into the Section 8 program, my partners and I believed that we would realize a fair rate of return and that HUD would use streamlined procedures for adjusting rents annually through automatic annual adjustments, rather than the case-by-case method.

4. Each of the plaintiffs has entered into a Housing Assistance Payment ("HAP") contract with the United States Department of Housing and Urban Development ("HUD") for the provision of rental housing to low-income families or low-income senior citizens. Attached as Exhibit 1 is a list identifying each of the plaintiffs, and, for each such plaintiff, the location of the project, the HAP contract number by HUD monthly debt service on the project, and the amount owed.

5. Each of the plaintiffs executed with HUD one of several different HAP form contracts. Attached as Exhibits 2-A, 2-B and 2-C are true and authentic copies of three variations of the HAP contracts. The form of contract that each plaintiff executed with HUD is identified in Exhibit 1.

6. Pursuant to the terms of the HAP agreements, each of the plaintiffs construed a new apartment complex to provide rental housing for low-income senior citizens. Pursuant to the terms of the HAP agreements, each of the plaintiffs presently provides rental housing for low-income families or low-income senior citizens.

7. Each of the HAP contracts and the Agreements to Enter into HAP contracts ("AHAPs") that plaintiffs executed with HUD contains a rent adjustment provision that expressly requires HUD to compute annual rent adjustments according to the formula published in the *Federal Register*, commonly known as the Automatic Annual Adjustment Factors ("AAAF").

8. Each of the HAP contracts described in paragraph e contains a rent adjustment provision. The relevant rent adjustment provision in 39 of plaintiffs' HAP con-

tracts, each of which is identified as contract form 1 or 2 in Exhibit 1, states:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

9. In the remaining 20 HAP contracts, each of which is identified as contract form 3 in Exhibit 1, the relevant rent adjustment provision states:

> Upon request from the Owner to the [Contract Administrator], Contract Rents will be adjusted on the anniversary date of the Contract in accordance with 24 CFR 888 and this Contract. See, however, paragraph (d).

10. Each of plaintiffs' HAP contracts, including the 20 HAP contracts identified in paragraph 9, was executed by a plaintiff and HUD pursuant to an AHAP. An AHAP is the agreement between the owner and the contract administrator which provides that, upon satisfactory completion of the project in accordance with the HUD-approved final proposal, the administrator will enter into the HAP contract with the owner. Attached as Exhibit 3 is a true and accurate copy of the form AHAP which each of the plaintiffs executed with HUD

prior to signing each of their respective HAP contracts. Each of plaintiffs' HAP contracts, including the 20 contracts identified in paragraph 9, was executed pursuant to an AHAP which includes the following provision:

> *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

11. Each of the AHAP agreements includes, as an exhibit, "[t]he Housing Assistance Payments Contract ("Contract") to be executed upon completion of the project." Exhibit 3 at ¶ 1.1c. Each of the exhibit HAP contracts that HUD appended to plaintiffs' AHAP agreements contains the adjustment provision identified in paragraph 9.

12. Consistent with the HAP agreements, HUD, between 1974, the first year a plaintiff partnership executed a HAP agreement with HUD, and various dates through 1983, awarded each plaintiff rent adjustments computed according to the AAAF formula that HUD published in the *Federal Register*. Attached as Exhibit 4 is a set of all AAAFs published by HUD from 1979 to date.

13. HUD, in 1983, and continuing at all material times through December 1989, ceased to award to Section

8 owners rent adjustments computed according to the AAAF formula published in the *Federal Register*. Despite the fact that HUD entered into HAP agreements with plaintiffs in which HUD specifically chose the formula method for adjusting rents on a yearly basis, HUD, in 1983, began to compute annual rent adjustments according to an alternative method, called a market or comparability study. Application of comparability studies presumptively guaranteed that HUD would pay project owners lower rent subsidies than HUD would be required to pay by application of the AAAF factors.

14. When HUD's California field offices, in 1983, first began to compute rent adjustment according to comparability studies, plaintiffs requested from HUD their full AAAF rent adjustments. HUD advised Section 8 developers that, for projects which sought upward rent adjustments based on the published AAAF formula, HUD would adjust project rents downward. Several plaintiffs unsuccessfully appealed from this determination and, in fact, HUD reduced their annual rents.

15. In response to HUD's threats to reduce project rents, and to protect their current rent levels, other plaintiffs' including New Hampshire Arms, A California Limited Partnership, and Valencia Villa, A California Limited Partnership, simply withdrew their requests for annual rent increases based on the AAAF formula. Attached as Exhibit 5 is a true and accurate copy of plaintiffs' correspondence with HUD, formally withdrawing their prior request for annual rent increases. Recognizing the futility of similar requests, other plaintiffs, thereafter, did not seek annual adjustments.

16. In May 1989, after the Supreme Court refused to review the Ninth Circuit's decision in *Rainer View*, HUD notified the property manager for each of the plaintiffs' Section 8 projects that HUD planned to apply the AAAF formula, prospectively and retroactively, to all of plaintiffs' projects located in the Ninth Circuit. Attached as

Exhibit 6 is a true and accurate copy of a May 19, 1989 Memorandum from James Schoenberger, General Deputy Assistant Secretary for Housing, to All HUD Regional Administrators, stating that HUD would apply the AAAFs prospectively and retroactively in the Ninth Circuit. Plaintiffs' property managers, on behalf of the plaintiffs, in fact, thereafter worked with the local HUD field offices to prepare a computer model to compute the retroactive AAAF rent adjustments.

17. Despite the representation in HUD's May 19, 1989 memorandum, HUD has never made payment to the plaintiffs for the amounts owed pursuant to the HAP agreements and the AAAFs published by HUD. The amounts HUD owes each of the plaintiffs (through March 31, 1990) pursuant to the AAAFs published in the *Federal Register*, is specified in Exhibit 1.

18. In November, 1989, Congress enacted the Department of Housing and Urban Development Reform Act of 1989. Section 801 of that Act addressed the question of comparability studies in Section 8 projects. As regards the past, Section 801 provides that HUD will increase rents by the greater of the amount determined by applying the AAAF to the base rent minus the amount of debt service or 30% of the amount determined by multiplying the full base rent by the AAAF. In the vast majority of our projects, the 30% figure will be larger, so the rent increase we would get under Section 801 would be only 30% of what we are entitled to under the HAP agreements. Even that reduced amount would be paid out over three years, without any interest to compensate us for the delay in receiving even this small portion of what we are entitled to under the contracts.

19. As regards the future, Section 801 permits HUD to use comparability studies rather than the AAAF formula which the HAP agreements require HUD to use.

20. After Congress (in November 1989) enacted the HUD Reform Act of 1989, HUD advised its regional

field offices, in December 1989, that it was imposing a temporary nationwide moratorium on the use of Section 8 comparability studies until such time as HUD promulgated regulations for the implementation of the comparability limitation. Attached as Exhibit 7 is a true and accurate copy of the December 20, 1989 Memorandum from James L. Logue, III, Deputy Assistant Secretary for Multi-Family Housing Programs, to All Regional Administrators, All Regional Directors of Housing, Field Office Managers, Directors of Housing Management and Loan Management Branch Chiefs.

21. As a result of HUD's December 20, 1989 Memorandum, HUD has applied the AAAF, instead of comparability or market surveys, to establish new rental rates for the plaintiffs with HAP contract anniversary dates subsequent to December 20, 1989. In some cases, HUD has applied the AAAF formula to compute new rental rates retroactive to May 1989. These new rates, however, are substantially lower than the rates required by the contracts and the previously published AAAFs because HUD, since December 1989, has applied the AAAFs to contract rents that HUD computed for approximately eight years according to comparability or market surveys, rather than the AAAF formula.

22. According to representations in HUD's December 20, 1989 Memorandum, the HUD field offices will compute plaintiffs' prospective annual rent adjustments according to comparability or market surveys when HUD finalizes and publishes comparability regulations in the *Federal Register.*

23. Prolonged delays in obtaining the full rent adjustments will harm not only the owners of the apartment complexes but also the tenants. The most obvious harm resulting from delay is, of course, the loss of the use of the money with the resulting loss of interest. Equally important, however, are the cashflow effects. Continued failure to receive the full amount of the rent

adjustments required by the HAP contracts may put some of the projects in precarious financial conditions. Inadequate cashflow will make it difficult or impossible to maintain the buildings properly and to take all of the security measures which are becoming increasingly necessary at certain complexes. It may be necessary to omit maintenance such as painting or repair of driveways, which does not affect the safety or health of the tenants, but certainly adversely affects their general well-being. In some cases, it may be impossible to take additional security measures, such as erecting a security fence or hiring security guards, which increasing problems of drugs and gangs make desirable. These problems are compounded by the fact that uncertainty over future rent levels sharply reduces the saleability of the complexes. This in its turn deprives owners of the incentive to make further investments in the buildings since the prospects of recovering any further investments are uncertain. This works to the detriment of tenants who are deprived of the advantages which they would derive from additional investment in maintenance and security of their apartments.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, belief and information. Executed on May 30, 1990 in Culver City, CA.

/s/ Jona Goldrich
JONA GOLDRICH

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-390 MRP

ACACIA VILLA, A CALIFORNIA PARTNERSHIP, ET AL., PLAINTIFFS

v.

JACK KEMP, ET AL., DEFENDANTS

DECLARATION OF LINDA L. CHEATHAM

I, Linda D. Cheatham, do declare under penalty of perjury as follows:

1. I am the Acting Director of the Office of Insured Multifamily Housing Development of the U.S. Department of Housing and Urban Development ("HUD" or "Department"). I have held this position since July 1990. As Acting Director, I have direct responsibility for all development activities that relate to the multifamily mortgage insurance programs and that establish the Section 8 New Construction and Substantial Rehabilitation Fair Market Rentals that are applied to rojects subject to those programs and Section 202 projects.

2. I offer this declaration to describe how Fair Market Rentals, as outlined in Section 8(c)(2)(A) of the U.S. Housing Act of 1937, as they relate to the Section 8 New Construction and Substantial Rehabilitation Programs, are computed and how those rents are utilized once computed.

3. The statements in this declaration are based on my personal knowledge and on information provided to me by my staff.

4. Fair Market Rentals, which HUD refers to as Fair Market Rents (FMRs) is HUD's determination of rents, including utilities, ranges, and refrigerators, parking and all maintenance, management, and other essential housing services, that would be required of a tenant in a particular market area to obtain privately developed and owned, newly constructed or substantially rehabilitated rental housing of modest design with suitable amenities. 24 C.F.R. § 880.201. Initial contract rents may not exceed area-wide Fair Market Rents established by the Department.

5. FMRs are published for each fiscal year in the *Federal Register*. The FMRs that are presently in effect were published on December 1, 1989, at 54 FR 49886.

6. The FMRs are estimates of rentals that prospective tenants who are not receiving Federal rent subsidies would be willing and able to pay for recently completed or newly constructed dwelling units of modest design, with suitable amenities. They do not necessarily represent rents needed to support construction and operating costs. The FMR process requires HUD to obtain data on the levels of rent paid for recently completed or newly constructed dwelling units of modest design within each market area, as determined by HUD field office staff, but generally multicounty areas.

7. FMRs are developed for five unit sizes as well as for five structural categories.

8. Estimates of FMRs by unit size, structural type, and market area are prepared by the HUD Field Office staffs. Surveys of at least 12 recently constructed projects for each structural type, either conventionally financed or insured by HUD, are conducted by HUD appraisers within each market area to obtain representative samples of rents paid for comparable unsubsidized recently con-

structed dwelling units of modest design with suitable amenities. No subsidized or assisted rental units are used in these market surveys. The "recently constructed" units are to be those buildings constructed no earlier than six years proceeding the year the FMR is published. For purposes of computing FMRs HUD has established 344 different geographical market areas nationwide.

9. Once the appraisers have surveyed rents in a particular geographical area, the appraiser determines what the 75th percentile of rent levels is for that market area and then trends the data ahead two years to reflect anticipated changes in rent levels. The result of that calculation is the indicated FMR for that particular market area.

10. The public is then notified of the schedule of FMRs by publication in a manner to reflect a progression from bedroom to bedroom size, and from one structural type to another.

11. The FMRs have been used in the process to establish initial contract rents for Section 8 projects approximately since 1976.

Executed on October 5, 1990

/s/ Linda D. Cheatham
LINDA D. CHEATHAM, Director
Office of Insured Multifamily
Family Housing Development
U.S. Department of Housing
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(202) 708-3000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

DECLARATION OF JAMES J. TAHASH

I, James T. Tahash, do declare under penalty of perjury as follows:

1. I am the Director of Planning and Procedure Division, U.S. Department of Housing and Urban Development ("HUD" or "Department"). I have held this position in this division and predecessor Division with the same responsibilities since 1972. In my capacity as Director, I have the direct responsibility for developing policies and procedures for administrating HUD's multifamily management programs.

2. The purpose of this declaration is to describe the process used by the Department in conducting comparability studies pursuant to Section 8(C)(2)(C) of the U.S. Housing Act of 1937, as amended.

3. The statements in this declaration are based on my personal knowledge and on information provided to me by my staff.

4. In 1981 HUD began implementing its authority under Section 8(C)(2)(C) by regulation, 24 C.F.R. 880.609(c) and the standard form Housing Assistance Payments ("HAP") contracts (such as the pre 1980 contract quoted in the Ninth Circuit's decision in *Rainier View Associates v. U.S.*, 848 F.2d 988 (1988)) to perform project specific comparability reviews if the application of the Annual Adjustment Factor ("AAF") produced rents in excess of rents charged for comparable units.

5. In performing comparability reviews HUD field staff were to select the three to five projects that were used in performing the "rent reasonableness" test when the initial contract rents were set.[1] When the original projects were not available or no longer comparable, the field staff were to use other comparable projects, i.e., unassisted projects that were located in the same geographical or contiguous area as the subject project that were similarly constructed (number of bedrooms, baths, type of design), had similar amenities, and services similar to the subject project. The "same geographical area" was defined as an area that contained housing stock similar to the subject project. Generally, comparable rents for projects will vary according to when they were built. For example, the rents for older comparable projects will be lower than rents for newly built projects, unless the payments have been refinanced.

6. Once the comparable projects were selected, HUD field staff then were to use acceptable appraisal techniques to adjust the rents of each comparable project to make the comparable projects as close as possible to the subject project. The staff were then to compare the Section 8 rent that would be charged as adjusted by the applicable AAF to the comparable rents. If there was no material difference, the Section 8 rents were to be adjusted based on the AAF. If there was a material difference the Section 8 rents were to be held constant, reduced, or provided a partial adjustment to reflect the rent level determined to be comparable.

---

[1] Although Fair Market Rents were to be used in seeking the initial contract rent, the rents that were authorized to be contracted for could not exceed the rents of comparable buildings. See 24 C.F.R. 880.204(b)(1)(ii) ("Rent Reasonableness"). Thus, comparability studies were required to be completed (except for Section 202 projects) before establishing the initial rent. Where comparable rents were lower than the FMRs, the FMR was not allowed to be the rental amount in the HAP contract.

7. The AAFs are, and have been since 1976, used to adjust HAP contract rents in the second and subsequent years of the HAP contracts.

Executed: November 13, 1990.

/s/ James J. Tahash
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Title Omitted in Printing]

DECLARATION OF DAVID E. SHENK

I, David E. Shenk, do declare under penalty of perjury as follows:

1. I am the Director of the Division of Economic Market Analysis of the Office of Economic Affairs of the U.S. Department of Housing and Urban Development ("HUD"). I have held this position since 1980. In my capacity as Director I have direct responsibility for, among other things, developing the Annual Adjustment Factors ("AAF"s), which are used to adjust Section 8 rents.

2. The purpose of this declaration is to describe how HUD produces AAFs.

3. The statements in this declaration are based on my personal knowledge and on information provided to by by my staff.

4. AAFs are percentage factors that are produced by HUD. They are developed using two different market surveys, the Consumer Price Index ("CPI) and the American Housing Surveys ("AHSs"). AAFs are developed for each of the four census regions and for 74 metropolitan areas. The CPI is used to determine the average rent change in each of the above identified areas, and the AHSs are used to calculate the differences in rent changes for the range of rents from low to high rent within these areas. In developing the AAF, HUD multiplies the percentage of rent change for each geographical area (derived from the CPI) by the nationwide percentage of rent change for each of several different rents levels (derived from AHS), to determine the AAF for each rent level for that particular geographical area.

5. The CPI is a measure of the average change in the prices paid by consumers for a fixed market basket of goods and services. The CPI is estimated from a set of samples, which are designed using statistical procedures to make the survey represtative of prices paid by consumers in the United States. In developing the AAFs, HUD uses annual average data from the Residential Rent and Fuel and Other Utilities indices of the CPI. The Residential Rent component is based on a national survey of 35,000 households, that are interviewed by telephone or personal visit, to determine changes in market rent levels. The survey is conducted by staff of the Department of Labor, Bureau of Labor Statistics.

6. Similarly, the AHS is a market survey designed to obtain statistically valid information on rent levels. The AHS, however, is designed solely to reflect changes in costs for housing, on a nationwide, not a metropolitan basis. The survey consists of a national sample of 55,000 housing units, which includes about 20,000 rental units. The sampie is representative of price and rent changes for the entire nation. The AHS is conducted by the Bureau of the Census for HUD.

Executed on November 14, 1990

/s/ David E. Shenk
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C89-1654R

ALPINE RIDGE GROUP, ET AL., PLAINTIFFS

vs.

JACK F. KEMP, in his official capacity as Secretary of the United States Department of Housing and Urban Development; and the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS

DECLARATION OF JANET MARIE

I, JANET MARIE, hereby declare as follows:

1. From 1979 through 1983, I was employed by HUD in the administration of the Section 8 program. From 1983 to 1987, I worked for the State of Washington in administering Section 8 contracts on behalf of the Department of Community Development.

2. In 1988, I formed Alexander Consultants Incorporated, a consulting firm for owners of governmental subsidized housing, including Section 8. My firm assists housing providers of low income families and senior citizens with the complex administrative and management activities unique to various government subsidized housing programs.

3. My firm represents the 97 project owners involved in the *Alpine Ridge* lawsuit. The statements in this

Declaration are based on my personal knowledge and on information provided to me by my staff and the project owners and managers.

4. The purpose of this Declaration is to respond to portions of the Declarations filed in this case by Robert Stettner on March 11, 1991 and Diana Shavey on April 28, 1991.

5. In paragraph 6 of Mr. Stettner's Declaration, he states as follows:

> Since [September, 1990], HUD has dutifully honored all rent adjustment requests (not only from plaintiffs in this matter, but from all Section 8 project owners that have projects within the jurisdiction of HUD's Seattle field office) by applying the applicable AAAF to the last HUD approved rent.

The first point is that, even if the statement were true, it should not be taken to mean that the project owners are receiving the rents to which they are entitled under the declaratory judgment. By "last HUD approved rent," Mr. Stettner is referring to the rents that were previously set contrary to the declaratory judgment, in most cases based on rent cuts from individual comparability studies in the 1980s. Even the projects which have received AAAF rent adjustments since the declaratory judgment are at rent levels up to 25% below the levels that would have resulted from AAAF rent adjustments during the 1980s. The other point is that the statement is untrue. In fact, *most* rent adjustments since the declaratory judgment have not been made to date. Attached as Exhibit A to this Declaration is a list of the projects in this litigation which have not received rent adjustments that became due since the declaratory judgment. The list includes those projects administered in the Seattle HUD office to which Mr. Stettner's Declaration refers, as well

as the projects in this litigation which are administered in other HUD field offices.

6. In paragraph 8 of Mr. Stettner's Declaration, he states as follows:

> The Department has not been advised by any plaintiff owner that its project is suffering a financial hardship resulting from the perception that they are owed more monies under their housing assistance payments contract than they are receiving. Indeed, most of the projects that are subject to this litigation are financially healthy and are throwing off surplus cash.

This statement refers to the "projects that are subject to this litigation" when his office only administers a little more than half of the projects. The other projects are administered by other HUD offices in Fresno, California, Sacramento, California, San Francisco, California, Los Angeles, California, Santa Ana, California, Denver, Colorado, Phoenix, Arizona, Las Vegas, Nevada, and Helena, Montana. Even with respect to the projects administered in the Seattle office, the statement is untrue and misleading. Attached are several letters from project owners describing their financial difficulties. The first five letters relate to projects administered out of the Seattle office. The statement that projects are "throwing off surplus cash" is misleading because of the way HUD defines the term. To HUD, the term includes any project which has one penny more than enough to meet HUD's "approved" expenses for the following month. The types of expenses HUD does not approved include legal fees in enforcing their rights against HUD, as well as other expenses deemed by HUD to be "unrelated," "unnecessary," or "excessive." For example, on the Coho project in Alaska (See attached letter from project owner), the project owner was required by the City to spend several thousand dollars to enclose dumpsters to keep out bears. HUD did not

"approve" the cost as necessary to maintain "decent, safe and sanitary" housing.

7. The attached letters from project owners are all I was able to get on short notice. Most of the other project owners have the same problems. Several project owners and managers declined to respond in writing for fear of retaliation from HUD. Examples of their statements are as follows:

> You know our (project) accounts receivable are overdue. We're in a financial mess. I don't want to draw any attention to myself by making a formal statement.
>
> I am afraid of HUD. I don't want to make any waves.
>
> The HUD inspector showed up at my project unannounced and harassed my on-site manager. She was intimidated and frightened.
>
> I told the owners to call you when I heard about this lawsuit. I know they are fed up and wish they had never gotten involved with Section 8 or HUD. I don't want HUD to know that I even suggested that the owners join the lawsuit. They're likely to take it out on some of my other projects.
>
> The HUD loan servicer visited our (senior citizen) tenants and told them that we are making excess profits, and we don't really give a damn about the tenants.
>
> I'm sorry that I avoided you (Janet Marie) at the conference. There were so many HUD people around from my local office. They don't know my project is in the lawsuit yet, and I would just as soon keep it that way as long as possible.
>
> (One) HUD loan representative told me that if we sue HUD, she will not process my rent increases for

other projects that are nonprofits. I just can't afford that chance.

8. Based on my extensive experience with all of the projects in this litigation, including those administered outside of the Seattle office, it is my estimate that over 75% of the project owners receive no return on their time and investment. They have been for years and still are literally working for nothing. Practically all of those projects are taking steps to opt out of the Section 8 program and remove the housing from the low income and elderly market. Roughly 35% to 40% of the projects are not even receiving rents sufficient to meet legitimate project expenses, resulting in staff cutbacks and deferred maintenance of the projects. The staff cutbacks, both in quantity and quality, mean the services to the tenants are greatly diminished (e.g., supervising and assisting the elderly and monitoring drug and other criminal activities), and the voluminous paperwork required by HUD is not being properly completed. The deferred maintenance has resulted in the deterioration of the physical condition of the projects which, in some cases, poses a danger for the tenants. At this time, roughly 10% of the project owners are ready to walk away from their projects. The percentages listed above have grown over time and will continue to grow unless and until the project owners begin receiving the rents to which they are entitled. If the current rents remain in effect, it is my opinion that many rental units will be lost to the low income and elderly tenants, either by foreclosure or the projects opting out of the Section 8 program.

9. In the Declaration of Ms. Shavey, she states that 15 hours of administrative time will be required to bring current rents to their proper levels. My firm has already made those calculations for *all* of the projects in this litigation. Even though we had to obtain most of the information *from HUD*, we spent roughly five to ten hours per project. On a number of projects, we have already provided the figures to HUD, and in all other cases we are prepared to provide the figures to HUD, together with all supporting data. If HUD reviews our figures, rather than starting from scratch, it should take no more than two to four hours per project.

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 13th day of May, 1991.

/s/ Janet Marie
JANET MARIE

SUPREME COURT OF THE UNITED STATES

No. 92-551

JACK F. KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 16, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

November 16, 1992

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Supreme Court, U.S.
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No. 92-551

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating vested contract rights.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: the United States Department of Housing and Urban Development; the United States; Monroe Associates, a limited partnership; Brentwood, a limited partnership; Campbell Courts Associates, a partnership; Cheney Gardens Limited Partnership, a limited partnership; Bitterroot Manor, a limited partnership; Acacia Villa; Alicia Park Apartments; Amerige Villa; Antelope Valley; Crown Plaza Associates, a Limited Partnership; Crestwood Inn, Inc.; Dakota Meadows Associated, a Limited Partnership; Douglas Grove, a Limited Partnership; Golden Valley Homes Associates, a Partnership; Gary D. Erickson; Bothell Landing Associates, a Partnership; Howard O. Wilson and Donita E. Wilson; Moses Lake Estates, a Limited Partnership; Howard Street Association, a Limited Partnership; Magnuson Group, a Joint Venture; Marion Court Associates, a Partnership; Meadowood Development Co., LTD.; Rainier Vista Associates, a Limited Partnership; Rawlins & Rex, a Partnership; Gordon Henrickson; Olympic Village, LTD., a Limited Partnership; Robert & Ingrid Becker, husband and wife; Park West Associates, a Limited Partnership; Sound View Associates, a Partnership; South Bayview Associates, a Partnership; Sundowner Associates, a Limited Partnership; Wapato Gardens, a Limited Partnership; Westwood Associated, a Partnership; Willapa Landing Associates, a Limited Partnership; Axelrod Marymoor Associates, a Limited Partnership; Security Rental Properties, a Partnership; Park West Associates, a Limited Partnership; Riverwood Manor Associates, a Partnership; Wright Park Associates, a Limited Partnership; Yakima Gardens, a Limited Partnership; Michael and Patti Carpinito, husband and wife; Dan and Carol Carpinito, husband and wife; Vista Lee Rosa Co., a Partnership; Terra Bella Development Co., a Partnership;

Goldsborough Creek Associates, a Limited Partnership; Craigmont Associates, a Limited Partnership; Fernhill Terrace Associates, a General Partnership; Meriwether Village, a General Partnership; COHO Park, a General Partnership; Lacey Housing, Inc., a General Partnership; Marvin L. Koh, Audrey S. Koh, Barbara E. Koh, Christopher C. Koh and David A. Koh; Narrows Apartments Associates; Hotel Oakland Associates, a Limited Partnership; Emeric Goodman Associates, a Limited Partnership; Azusa Park Apartments, a California Limited Partnership; Capitola Gardens, a California Limited Partnership; Carondelet Apartments, a California Limited Partnership; Charter Oaks, a California Limited Partnership; Civic Plaza, a California Limited Partnership; Citrus Arms, a California General Partnership; Clayton Gardens, a California Limited Partnership; Columbus Terrace, a California General Partnership; Commerce Senior Citizens, a California Limited Partnership; Covina Manor, a California Limited Partnership; Country Club Village, a California Limited Partnership; El Portal Gardens, a California Limited Partnership; Fairvalley Villa, a California Limited Partnership; Fallbrook Square Apartments, a California General Partnership; Foothill Gardens, a California Partnership; Foothill Terrace, a California Limited Partnership; Frazier Park, a California Limited Partnership; Grandview Homes, a California Limited Partnership; Hayward Villa, a California Limited Partnership; Kern Villa, a California Limited Partnership; Lake Merritt Apartments, a California General Partnership; Little Tokyo, a California Limited Partnership; Mayflower Arms, a California Limited Partnership; Merced Gardens, a California Limited Partnership; Millbrook Park Apartments, a California Limited Partnership; Monterey Terrace, a California Limited Partnership; Olive Tree Terrace, a California Limited Partnership; Palmdale East Q., a California Limited Partnership; Panorama Park, a Cali-

fornia Limited Partnership; Pendleton Arms, a California Limited Partnership; Pleasant Hill Village, a California Limited Partnership; Presidio Park Apartments, a California General Partnership; Primrose Villa, a California General Partnership; Rosswood Villa, a California Limited Partnership; Runnymede Gardens, a California Limited Partnership; San Gabriel Villa, a California Limited Partnership; San Jose Greens, a California Limited Partnership; Santa Teresa Apartments, a California Limited Partnership; Seaside Villa, a California Limited Partnership; Skypark Apartments, a California General Partnership; Southbay Villa, a California Limited Partnership; Surfside Villas, a California Limited Partnership; Terman Apartments, a California Limited Partnership; Tujunga Gardens, a California Limited Partnership; Tustin Gardens, a California Limited Partnership; Valencia Villa, a California Limited Partnership; Villa Del Comanche, a California Limited Partnership; Villa Olive Oak, a California Limited Partnership; Villa San Dimas, a California Limited Partnership; Villa Topanga II, a California Limited Partnership; Vista Park Chino, a California Limited Partnership; and Wasco Arms, a California Limited Partnership.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-551

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 955 F.2d 1382. The opinion of the district court in the *Alpine Ridge* case, Pet. App. 15a-30a, is reported at 764 F. Supp. 1393; a supplemental order in that case, Pet. App. 32a-39a, is unreported. The opinion of the district court in the *Acacia Villa* case, Pet. App. 40a-60a, is reported at 774 F. Supp. 1240; the final judgment in that case, Pet. App. 61a-63a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 29, 1992. Pet. App. 64a-66a. On August 18,

1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 26, 1992. The petition for a writ of certiorari was filed on September 25, 1992, and granted on November 16, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law." Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f note (Supp. II 1990)); Section 8(c)(2) of the United States Housing Act of 1937, as added by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, Tit. II, § 201(a), 88 Stat. 663 (codified at 42 U.S.C. 1437f (c)(2) (1982)); and 24 C.F.R. 880.609 and 888.204 are set forth in relevant part in the appendix to this brief.

STATEMENT

This case involves a constitutional challenge to an Act of Congress that specifies the techniques for adjusting rents in the Section 8 program, a federally subsidized housing initiative. The court of appeals held that the statute, Section 801 of the Department of Housing and Urban Development Reform Act of 1989 (Reform Act), violates the Due Process Clause of the Fifth Amendment by abrogating contracts between the owners of Section 8 housing projects and the United States Department of Housing and Urban Development (HUD).

1. *Background.* In 1974, Congress added the Section 8 program to the United States Housing Act of 1937

(Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to millions of low income tenants by authorizing, *inter alia*, the payment of rent subsidies to private owners and developers of low-income housing. The tenant's rental obligation is based on his ability to pay, while the federal government makes "assistance payments" to the project owner to bring the owner's total rental income up to the prevailing market level. See generally 42 U.S.C. 1437a(a), 1437f(b) and (c).

Under the Section 8 program, HUD enters into standard long-term contracts with project developers and landlords. These are known as "housing assistance payment contracts" or Assistance Contracts. The framework for those contracts is governed by statute. Under the statute, an initial maximum monthly contract rent is established for each dwelling unit; that rent cannot exceed by more than 20 percent the prevailing market rents. 42 U.S.C. 1437f(c)(1). The statute, as originally enacted, also provided for adjustments in the maximum monthly rent in accordance with the following provisions:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.
>
> * * * * *
>
> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

42 U.S.C. 1437f(c)(2)(A) and (C) (1982).[1]

[1] In 1988, Congress amended Section 8(c)(2)(C) of the Act, *inter alia*, by deleting the phrase "assisted and comparable unassisted

The Assistance Contracts implement those provisions by (1) providing that adjustment of rents will be made on the basis of a reasonable formula, but (2) stipulating as an "overall limitation" that, notwithstanding any other provision of the contract, adjustments shall not produce material differences between the rents at comparable assisted and unassisted units.

First, as to the formula-based adjustment, the standard form Assistance Contract in use through 1980 states:

> b. *Automatic Annual Adjustments*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register. * * *
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

Assistance Contract, § 1.9b.[2] The Automatic Annual Adjustment Factors (Adjustment Factors) are generated by

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units" and replacing it with the phrase "assisted units and unassisted units of similar quality and age in the same market area." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(A), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C). In 1989, Congress amended that phrase by inserting ", type," after the word "quality". Reform Act, § 801(g), 103 Stat. 2059.

[2] The rent-adjustment provisions of the typical original Assistance Contract are reproduced in the appendix to this brief at 7a-9a, *infra*. The original version of the contract, published by HUD as an

HUD's Office of Economic Affairs, which uses two market studies, the Consumer Price Index and the Bureau of the Census American Housing Surveys, to produce a percentage by which the rent will be adjusted. HUD establishes a limited number of Adjustment Factors to cover the entire country. See, *e.g.*, 52 Fed. Reg. 9,478-9,491 (1987) (Adjustment Factors established for four census regions, Alaska and Hawaii, and 72 metropolitan areas).

Second, as to the cap on the formula-based adjustments (required by 42 U.S.C. 1437f(c)(2)(C)), the Assistance Contract states:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *.

Assistance Contract, § 1.9d. HUD regulations also reflect the Secretary's determination to make adjustments in rents based on the Adjustment Factors, subject to an overall cap that adjustments shall not produce material differences from rents at comparable unassisted units, as determined by HUD. See 24 C.F.R. 880.609(c).[3]

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appendix to its regulations for the Section 8 new construction program, 40 Fed. Reg. 18,703 (1975), contains identical language in Section 1.8b. *Id.* at 18,705. The Assistance Contracts in use after 1980 provide that, at the owner's request, contract rents will be adjusted in accordance with HUD regulations. See HUD Form 52522D (8-80), ¶ 2.7, reproduced in the appendix to this brief at 9a-10a, *infra*. Samples of the original and post-1980 contracts were included as Exhibits B and E, respectively, to the Affidavit of Warren J. Daheim in Support of Motion for Summary Judgment, *Alpine Ridge Group v. Kemp*, No. C89-1654R (W.D. Wash., filed Apr. 6, 1990).

[3] That regulation is reproduced in the appendix to this brief at 6a-7a, *infra*. The original regulations adopted to implement the Section 8 new-construction program contain the same provision. See 40 Fed. Reg. 18,687 (1975) (promulgating 24 C.F.R. 880.110(d)).

2. *The* Rainier View *decision.* In the early 1980s, HUD became concerned that application of the Adjustment Factors was yielding rents at some projects that were unduly high in comparison with comparable unassisted units. Accordingly, to comply with the statutory directive to avoid excessive rents and in conformity with the overall limitation provision of the Assistance Contracts, HUD began to undertake, with respect to individual projects, "comparability studies" as a means of determining the rents charged in comparable unassisted units. Those studies would identify three to five comparable projects in a relevant geographic area; the agency would then conduct appraisals to see whether the rents at those projects were materially different from the Section 8 project rents. If the differences were material, the rents determined through the comparability studies would serve as a "cap" to the rental increase produced by the more general Adjustment Factors.

HUD's determination to use comparability studies as a cap to increases produced under the Adjustment Factors led to litigation. Section 8 project owners not only challenged the process by which HUD conducted comparability studies, they also claimed that the use of such studies to limit increases under the Adjustment Factors violated their contracts with HUD. In *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989), the court of appeals rejected HUD's interpretation of the law and the language of the contracts, and concluded that HUD could not use comparability studies as an independent cap to formula-based rent increases.[4]

[4] Prior to ruling on the merits, the court of appeals voted to hear the case en banc in order to determine a jurisdictional issue: whether the case was a contract action, such that jurisdiction lay exclusively in the Claims Court. In an unpublished order dated March 7, 1988, the en banc court determined that the Claims Court's jurisdiction was not exclusive, because although the case was "contract related," it "rests at bottom on statutory or regulatory rights." See App. to Pet. for Cert. 50a. *United States* v. *Rainier Views Assocs.*, No. 88-1515 (Oct. Term 1988).

The *Rainier View* court stated that Section 8(c)(2)(A) allows HUD to choose *either* the market-survey *or* the reasonable-formula method for adjusting rents, and that "[t]he overall limitation provision [of the statute and the contract] * * * is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. The court found that HUD, having elected to use a reasonable formula in the Assistance Contracts, could not go back on that choice by applying a market-survey cap through the comparability studies. In the court's view, that approach would nullify the formula method that the statute authorizes and that HUD elected. The court also believed that HUD's regulations took the view that the "overall limitation" on rents had to be integrated into the adjustment formula, not superimposed on top of it. *Ibid.*, citing 24 C.F.R. 888.204. In short, *Rainier View* acknowledged that adjustments were limited by comparable rents, but held that comparability determinations had to be considered in creating the formula, not applied as a separate cap.

Shortly before the panel ruled in *Rainier View*, Congress amended Section 8 in a manner that confirmed the permissibility of HUD's use of comparability studies as a separate cap to Adjustment Factor increases.[5] Although the court of appeals was advised of that amendment, it denied rehearing. This Court denied the government's petition for a writ of certiorari. 490 U.S. 1066 (1989).

[5] It did so by adding to Section 8(c)(2)(C) the following sentence: "If the Secretary * * * does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C).

3. *The statute at issue in this case. Rainier View* did not end the disputes between HUD and Section 8 project owners over the use of comparability studies. HUD continued to believe that *Rainier View* was wrongly decided and declined to apply that decision outside the Ninth Circuit. Section 8 project owners continued to assert entitlement to automatic formula-based rent adjustments without application of a separate comparability cap. The dispute prompted further litigation, interfered with program administration, and created disparate rent adjustments for projects located in different circuits. In December 1989, Congress enacted Section 801 of the Reform Act [6] with the goal of restoring uniform and appropriate procedures to govern rent adjustments.

The Reform Act sought to "ensure a reasonable rate of return to the owners while effectuating the original congressional objective * * * of avoiding excessive rents and rates of return for section 8 projects." [7] It prescribes new procedures for calculating rent adjustments, both retrospectively and prospectively. The retrospective provisions require HUD to pay landlords an increased amount, above and beyond what the comparability studies required HUD to pay under its interpretation of the contracts. The prospective provisions establish a limited role, under defined criteria, for HUD's future use of comparability studies.

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[6] Pub. L. No. 101-235, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f note (Supp. II 1990)).

[7] 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato). The Senate Banking, Housing, and Urban Affairs Committee explained that "[t]he Committee did not * * * share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies. Clearly, a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989).

a. *Section 801(a): Retrospective payments.* To deal with HUD's prior use of comparability studies, the Reform Act provides for increased rental payments to certain Section 8 project owners. § 801(a), 103 Stat. 2057-2058. The provision applies to owners whose rental adjustments were limited because of HUD's use of a comparability study as an independent cap, as well as to owners who did not request rental readjustments because they anticipated that HUD would reduce their project rents.[8]

For the period from fiscal year 1980 until the date when HUD promulgates new regulations to govern future rental adjustments, the provision requires HUD to calculate rental adjustments in an amount equal to the Adjustment Factor times the portion of the contract rent other than that used for debt service. At the request of an owner, HUD is then to pay the amount by which that rental-adjustment figure exceeds the rental adjustments actually approved by HUD for the relevant years. In no event, however, is such a retroactive payment to be less than 30 percent of the Adjustment Factor times the full contract rent, less rental subsidies actually approved. In short, this provision requires HUD retroactively to increase, to at least 30 percent of the Adjustment Factor level, payments made to owners whose adjustments were limited by comparability studies.[9] HUD has issued detailed regulations to govern the process of making such retroactive payments. 56 Fed. Reg. 20,078 (1991). In

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[8] Section 801(a) is expressly made inapplicable to projects covered by a prior final judgment in litigation over the authority of the Secretary to use comparability studies to limit rental adjustments. § 801(a)(2)(B), 103 Stat. 2058.

[9] Furthermore, the Reform Act provides that, at a project owner's request, HUD will make a one-time redetermination of the contract rent as a basis for future rent adjustments. § 801(d), 103 Stat. 2058-2059. Under that provision, the contract rent will be the

addition, Congress has separately appropriated in the past three fiscal years a total of $210 million for such payments.[10]

b. *Section 801(c): Prospective comparability regulations.* For the future, the Reform Act requires HUD to promulgate "regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments * * * would result in such material differences" between assisted and unassisted units, and to use those studies to establish a "modified annual adjustment factor" for a geographically smaller area. § 801(c), 103 Stat. 2058. The statute describes in detail the methodology to be used by the Secretary in conducting such comparability studies. It also stipulates that if a modified adjustment factor cannot be established or fails to eliminate material differences between rents at comparable assisted and unassisted units, the Secretary may apply another methodology "for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units." *Ibid.* In keeping with those provisions, HUD has proposed regulations to govern the conduct and use of comparability studies to generate modified adjustment factors, and, in cases in which such factors are not effective, to provide for a system of adjusting rents through comparability studies. 57 Fed. Reg. 49,120 (1992).

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greater of (a) the currently approved contract rent, or (b) the contract rent as calculated under the retroactive provisions in Section 801(a).

[10] See Pub. L. No. 102-389, 106 Stat. 1583 (1992) (appropriating $70,000,000 for fiscal year 1993); Pub. L. No. 102-139, 105 Stat. 745 (1991) (appropriating $70,000,000 for fiscal year 1992); Pub. L. No. 101-507, 104 Stat. 1357 (1990) (appropriating $1,810,442,000 for fiscal year 1991, $70,000,000 of which was for retroactive payments, see H.R. Conf. Rep. No. 900, 101st Cong., 2d Sess. 15 (1990)).

4. *The present controversy.* Respondents are developers and owners of Section 8 projects. They brought challenges to the constitutionality of Section 801 of the Reform Act, contending that their Assistance Contracts, as construed in *Rainier View*, entitled them to rent increases in accordance with the full Adjustment Factors, because HUD had applied comparability studies as separate caps, rather than factoring them into the formulas themselves. They further claimed that Section 801 had altered that contract right in violation of the Due Process Clause of the Fifth Amendment. The United States District Courts for the Western District of Washington and the Central District of California, in separate cases, declared Section 801 unconstitutional, Pet. App. 15a-31a, 40a-63a, and the government appealed.

The court of appeals consolidated the two cases and affirmed. Pet. App. 1a-14a. The court first held that it was bound by *Rainier View*'s contractual holding that comparability studies could not be used as separate caps to rent increases under the Adjustment Factors. The court declined to revisit that holding notwithstanding the fact that amendments to the Section 8 program revealed that Congress had intended comparability studies to serve as separate caps to such rent increases. Pet. App. 6a-8a.

The court of appeals then determined that the owners' contractual rights to rent increases under the Adjustment Factors were "vested" property rights. Pet. App. 8a-12a. The court acknowledged the principle that Congress retains authority to legislate in ways that affect government contracts unless that power is "surrendered in unmistakable terms," Pet. App. 9a, quoting *Peterson* v. *United States Dep't of Interior*, 899 F.2d 799, 808 (9th Cir.) (quoting *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)), cert. denied, 111 S. Ct. 567 (1990). The court also acknowledged that Congress may enact "curative" legislation that affects property rights. Pet. App. 10a-11a.

Nevertheless, the court held that those principles are not applicable here, because "HUD *explicitly* limited its statutory options * * * and bound itself to that choice" by entering into contracts with the owners that are "supported by independent consideration." *Id.* at 10a, 12a. Accordingly, the court stated that the owners acquired a vested right to use of the "formula methodology for adjusting rents." *Id.* at 12a.

Finally, relying on *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), the court of appeals found that Section 801 had unconstitutionally altered respondents' contract rights solely to save the government money. Pet. App. 12a-14a. The court rejected the contention that Section 801 had the valid purpose of clarifying that respondents are wrong in claiming entitlement to rent increases based on the Adjustment Factors free from the "overall limitation" cap. It also dismissed the argument that Section 801 is constitutionally valid as a measure designed to resolve the continued dispute over the proper method for adjusting rent increases in the Section 8 program. The court therefore concluded that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the [F]ifth [A]mendment." Pet. App. 14a.

SUMMARY OF ARGUMENT

The court of appeals' holding that Section 801 of the HUD Reform Act impaired vested contract rights, in violation of the Due Process Clause, raises three legal issues: first, whether the asserted contract rights exist; second, whether the alleged impairment of those rights is substantial; and third, whether any substantial impairment is justified in the light of the nature of the statute and its legislative purposes. In this case, none of the three required showings has been made; accordingly, this Court should uphold the constitutionality of Section 801.

I. The initial issue is whether project owners in the Section 8 program have a contract right to annual rent increases in accordance with a published formula, without application of a separate cap based on the results of a market survey (known as a comparability study). If the owners lack such a contract right, their claim that Section 801 impairs it is unfounded. The answer to that question is plain: the contracts provide, as an "overall limitation," that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." Assistance Contract, § 1.9d.

Under that provision, HUD has the clear right to override formula-based adjustments in order to achieve the "overall" requirement of comparability. The claimed contract right to be free from separate comparability caps is therefore inconsistent with the contract's unambiguous language. Nor does the claimed right find support in the underlying statute or the regulatory background. Because the contract right on which respondents based their challenge to Section 801 does not exist, that provision does not infringe their due process rights.

II. A. On the assumption that respondents have the contract right they claim, Section 801 does not work a substantial impairment of that right. On a retroactive basis, Section 801 puts the owners in a better financial position than they would have occupied if HUD had understood the requirement of incorporating the results of comparability studies into the factors governing rent adjustments. On a prospective basis, Section 801 does little more than modify the procedures for adjusting rents, without changing the owners' financial rights. Such a procedural change that leaves the owners' economic rights intact is not of constitutional dimension.

B. Even if the impairment of contract rights is viewed as substantial, Section 801 is valid. The statute is neither arbitrary nor irrational in light of its purposes: to cure the Ninth Circuit's unexpected interpretation of the contracts and to restore uniformity to the program's operation. Section 8 landlords have no equitable claim to keep the windfall benefits of a contract that was never intended to pay above-market rents. Nor can they complain about the prospective revision of procedures that reinforces the program's original, and continuing, market-rent premise.

Given that context, the court of appeals erred in finding that Section 801 impairs vested rights solely for the purpose of saving money. That analysis of Congress's purposes is mistaken. This case differs from those in which Congress abrogated the terms of a government debt simply to reduce expenses. Here, Congress confronted a situation in which inconsistent standards were harming the uniform operation of a national social welfare program, and it resolved to steady the program through a law that reasonably compromised the competing interests. There was no total repudiation of government contracts; rather, in Section 801, Congress carefully tailored its action to minimize any intrusion on contract rights. Because Section 801 is rationally designed to achieve a permissible regulatory purpose, the statute satisfies the requirements of the Due Process Clause.

ARGUMENT

SECTION 801 OF THE HUD REFORM ACT DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF SECTION 8 PROJECT OWNERS

The Due Process Clause of the Fifth Amendment protects against deprivations of "life, liberty, or property, without due process of law," U.S. Const. Amend. V, and contract rights may constitute property rights. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 278 n.31 (1969); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). As this Court has explained:

> To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations. If an impairment is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage; if the impairment is substantial, a court must look more closely at the legislation.

National R.R. Passenger Corp. v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985) (citations omitted); see *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109 (1992).

The court of appeals concluded that Section 801 of the HUD Reform Act impairs respondents' contract rights and that the impairment violated the Constitution. That conclusion is wrong for three reasons. First, respondents lack the contract rights on which they based their challenge to Section 801. Second, even if those rights existed, Section 801 did not substantially impair them. And, finally, any substantial impairment found in this case is justified in light of Congress's important purpose

to reinstate the market-rent premise of the Section 8 program and to restore uniformity to the program's operation.

I. SECTION 8 PROJECT OWNERS HAVE NO CONTRACT RIGHT TO ANNUAL RENT INCREASES WITHOUT APPLICATION OF AN INDEPENDENT COMPARABILITY CAP

The threshold issue in this case is whether, as the court of appeals held in *Rainier View*, Section 8 project owners have a contract right to rent increases under the Adjustment Factors without application of a separate comparability cap. In light of the unequivocal contract language and its statutory and regulatory background, *Rainier View*'s holding that the Assistance Contracts prohibit HUD's use of a separate comparability cap is untenable.[11]

A. The Assistance Contracts Authorize An Independent Comparability Cap

Section 1.9b of the Assistance Contract states that HUD will publish annual adjustment factors, and will adjust rents by applying those factors to contract rents. Section 1.9d, however, subjects that procedure to what is explicitly termed an "*overall limitation*" that trumps the formula when the formula would produce above-market rents—"*Notwithstanding and other provisions of this*

[11] The three courts outside of the Ninth Circuit that have considered constitutional attacks against Section 801 have each concluded that *Rainier View* is wrong. Those courts have found that project owners do *not* have a right to the full formula adjustment regardless of the results of a comparability study. Accordingly, those courts have held that Section 801 has not deprived landlords of constitutionally protected contract rights. *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.); *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).

Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government" (emphasis added). That language clearly states that the requirement of avoiding material differences takes precedence over all other contractual provisions: it is an "overall limitation."

The "overall limitation" provision plainly authorizes "comparability studies" as a means of keeping rent adjustments in line with comparable projects. The published Adjustment Factors, while adjusting rents by a presumptively reasonable amount, cannot assure that for each specific project the formula-based rent increases will avoid material differences between assisted and comparable unassisted units. For example, many projects are covered by the Adjustment Factor for one of the four national Census Regions.[12] While "[o]n average, the Census Region [Adjustment Factors] used for such areas are statistically reliable, * * * [the] use of a [single] factor to cover such a large area can conceal significant local differences." 57 Fed. Reg. 49,121 (1992).[13] It was to address such local differences that HUD developed the comparability-study approach.

[12] HUD currently produces Adjustment Factors for the four Census Regions (Northeast; North Central; South; and West) and for 74 metropolitan areas. "Projects within one of these metropolitan areas receive the corresponding [Adjustment Factor]. Other projects receive the [Adjustment Factor] for their respective census region. Thus, 78 [Adjustment Factors] determine rent changes in every project in the country which has rents adjusted on the basis of annual adjustment factors." HUD, *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937*, at 2 (July 27, 1990) [HUD Report]. We have lodged copies of the HUD Report with the Clerk of this Court.

[13] For example, a single Census Region covered both "the depressed market conditions that prevailed in much of the Pacific Northwest during the early 1980's" and "the hyperinflated housing markets of southern California." HUD Report, *supra*, at 7.

When it suspected that Adjustment-Factor increases might be excessive, HUD surveyed rents at three to five comparable projects in a relevant geographic area.[14] If the results of the comparability study revealed no material differences between the assisted and unassisted projects, HUD applied the Adjustment Factors to adjust rents; if, however, material differences were discovered, HUD capped the rent increase so that it did not materially exceed comparable rents at unassisted projects.[15]

Each of the Section 8 project owners signed an Assistance Contract specifying that rent adjustments were sub-

[14] The process worked as follows:

> HUD field staff were to select three to five projects that were used in performing the "rent reasonableness" test when the initial contract rents were set. When original projects were not available or no longer comparable, the field staff were to use comparable projects, *i.e.*, unassisted projects located in the same geographic area of similar construction and with similar amenities and services. Once the comparable projects were selected, HUD field staff were to use acceptable appraisal techniques to adjust the rents of each comparable project so as to make the comparable projects as close as possible to the subject project.

National Leased Housing Ass'n, 22 Cl. Ct. at 657.

[15] Alpine suggests (Br. in Opp. 7 n.12, 11-19) that HUD's "real purpose" in using comparability studies was to erase differentials between contract rents and rents at comparable unassisted projects that were established in the original agreements (see note 22, *infra*). There is no merit to that suggestion. The contract provides that the comparability "limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." Assistance Contract, § 1.9d. HUD protected against erosion of the initial difference by applying the comparability cap only when the Adjustment Factor produced a *materially* different rent increase from a comparability study, and "[a] material difference exists whenever the adjusted Section 8 rent would *exceed* 120 percent times the sum of the comparable rent and the initial difference." *National Leased Housing Ass'n*, 22 Cl. Ct. at 661 (quoting 1986 HUD memorandum; emphasis added by court). Thus, HUD's materiality test preserved the initial difference.

ject to the "overall limitation" clause. The language of that provision clearly expresses the requirement that adjustments that result in material differences between assisted and unassisted projects will not be made, and it necessarily envisions that HUD will conduct a survey of some kind in order to determine the prevailing rent levels in the unassisted market. In the face of the "overall limitation" provision, there is no credible claim that project owners enjoyed an unqualified right to the full Adjustment Factor rental increase each year, regardless of how out-of-line that increase might have been with rents at comparable unassisted projects.[16]

The *Rainier View* court stated that the only use the contract allows HUD to make of comparability studies is to employ them in modifying the Adjustment Factors. 848 F.2d at 991. But the contract language contains no such statement.[17] Rather, the contract states that the com-

[16] Three courts have so read the contract language. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 659 ("The title 'Overall Limitation' and the phrase '[n]otwithstanding any other provisions of this Contract' indicate very precisely that the limitation in paragraph 1.9d is paramount; that it overrides any other provision in the contract, including paragraphs 1.9b and 1.9c, that otherwise would result in a rent adjustment that would produce a material difference from rents charged for comparable unassisted units."); *Sheridan Square Partnership*, 761 F. Supp. at 743 ("The language is clear; the [overall limitation] paragraph is meant to trump conflicting provisions."); *Carmichaels Arbors Assocs.*, 789 F. Supp. at 688 ("[S]tated another way, [the overall limitation paragraph provides that] no matter what any other section in the contract says, no rental adjustment can materially exceed rents paid for comparable unassisted units. Under [that language] * * * its mandate may and must be carried out even if this action violates every other provision of the contract.").

[17] "[T]here is no provision in the contracts that obliges HUD to follow any particular procedure for setting the rent adjustments after it has conducted a comparability study and quantified the rents charged for comparable unassisted units. Thus, nothing in the contract language specifically obliges HUD to translate the results of a

parability limit on rent adjustments shall govern "[n]otwithstanding any other provisions of this Contract." Assistance Contract, § 1.9d. That provision puts project owners on notice that, regardless of all else in the contract, rents will not be adjusted materially above the level of comparable unassisted units "as determined by the Government." *Ibid.* In short, the contract language conclusively establishes the permissibility of independent comparability caps.

B. The Statutory Background Confirms The Validity Of HUD's Use Of Comparability Studies

Examination of the Housing Act further supports HUD's authority to apply a separate comparability cap to rent increases generated by the Adjustment Factors.

1. When the Assistance Contracts were signed, the Act stated that contracts in the Section 8 program shall provide for rental adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A) (1982). The Act added the independent requirement, however, that rental adjustments "as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C) (1982).

Those provisions required the Secretary to ensure comparability, but did not prescribe the methodology for achieving that result. Nor does the legislative history illuminate that issue.[18] Because the statute affords the

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comparability study into modified [Adjustment Factors] and then to set the amount of rent increases based on such [modified Adjustment Factors]." *National Leased Housing Ass'n*, 22 Cl. Ct. at 659.

[18] The comparability limitation originated in the House bill. See H.R. 15361, § 201, 93d Cong., 2d Sess. (1974). The House committee report explained that the rent adjustment provisions were designed to allow project owners to offset reasonable costs they incurred, while imposing "strict conditions that will assure that higher costs resulting from inefficient management practices are not compensated by increases in either the subsidy or in the amount of rent paid by a tenant." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 21-22 (1974). The section-by-section analysis states only that "authorized adjustments in maximum rents could not result in material differences between the rents charged for assisted and comparable unassisted units," *id.* at 59, without discussing methodology.

Secretary discretion about how to fulfill the requirement that material differences be avoided, the Secretary had authority to adopt a reasonable interpretation of that requirement that is consistent with the Act. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). HUD's decision to use comparability studies as separate caps was both reasonable and permissible under the Act.

The comparability cap reasonably seeks to accomplish the statutory objective: the avoidance of material differences for a particular project. The alternative that the court of appeals favored—recomputation of the Adjustment Factors in response to the results of a comparability study—would be an inordinately burdensome way to achieve the result mandated by the statute. As discussed above, the Adjustment Factors cover broad geographic areas. The finding that the Adjustment Factors do not adequately reflect changes in rent levels for a particular Section 8 project does not mean that the Factors are inadequate for other projects. Changes in housing costs reflect local economic conditions, and there may be no need to revise the Factors as a general matter in response to the discovery of disparities involving individual projects. Moreover, any change in the composition or methodology of the Factors made to accommodate a particular comparability study may produce anomalous results for

another Section 8 project governed by the same Factors. Accordingly, "it could be difficult and costly for HUD to make an optimal adjustment to a formula covering a broad geographic area based on the results of one comparability study that focuses on one Section 8 project." *National Leased Housing Ass'n*, 22 Cl. Ct. at 662 n.10.

Under the statute, the ultimate financial test is comparability, and the economic consequences to any particular owner are identical whether HUD modifies the Adjustment Factors in light of a comparability study or applies the comparability study directly as a cap. No matter which methodology HUD employs, the bottom line for the owner would be the same: the adjustment would not produce rents materially in excess of rents at comparable unassisted projects. Nothing in the statute suggests that Congress was concerned about which methodology HUD employed to reach that result.

Not only is the Secretary's interpretation of the Housing Act valid under *Chevron*, it was ratified by Congress's action in the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988). That amendment provided that if HUD did not submit a comparability study to a Section 8 owner within 60 days of the anniversary date of the contract, the full Adjustment Factor would apply. See note 5, *supra*. That provision, of course, presupposes the validity of HUD's use of a comparability study as a separate cap. Section 801 likewise confirms the permissibility of separate comparability caps. A statutory amendment authorizing continuation of the agency's approach is "virtually conclusive" in interpreting the statutory scheme. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91-92 (1958).

2. Respondents suggest that "background facts," "real life context," and "attitudes of the [Section 8 project]

owners" support the claim that project owners had a settled expectation that rents would be "adjusted by multiplying the previous year's rent by a published inflation factor" and that there would be no "case-by-case rent adjustments." Acacia Br. in Opp. 2, 4, 12; see Alpine Br. in Opp. 2-3. In light of the clear language of the contract and statute, that contention is difficult to accept. Whatever respondents claim to have believed about the Section 8 program, Section 1.9d of the contract informed them that a comparability standard was to be implemented as an "overall limitation," taking precedence over everything else in the contract. Respondents cannot now rely on their impressions to the contrary.[19] See *Kihlberg* v. *United States*, 97 U.S. 398, 402 (1878) ("The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument.").

Moreover, quite apart from the fact that respondents' impressions are legally irrelevant, their assertion (Acacia Br. in Opp. 3-4; Alpine Br. in Opp. 2-3; J.A. 29-30, 32, 36-37) that HUD led developers to believe that the Adjustment Factors would apply automatically and without regard to the results of comparability studies for a particular project is factually inaccurate. In getting the Section 8 program underway, HUD explained to developers that comparability studies would serve as a cap to formula-based increases. In 1984, Charles L. Edson,

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[19] The Assistance Contract contains an integration clause (§ 1.1g) that states: "This Contract including said exhibits, comprises the entire agreement between the parties hereto, and neither party is bound by any representations or agreements of any kind except as contained herein." 40 Fed. Reg. 18,703 (1975) (setting forth standard Housing Assistance Payments Contract). This provision makes explicit the established principle that a "written contract merge[s] all previous negotiations, and is presumed, in law, to express the final understanding of the parties"; parol evidence cannot be used to vary the terms of the agreement. *Simpson* v. *United States*, 172 U.S. 372, 379 (1899).

counsel to the National Leased Housing Association, testified to a congressional committee that

> in structuring section 8, Congress meant it to be a market program. Rents would rise by either the fair market rents in the area, or a reasonable formula which as our legislative history shows was the CPI, *but there was a cap, a market discipline cap, and that is where comparabilities came in. Rents could not exceed the rents of a comparable project in the area.* [20]

In meetings around the country, HUD explained this process to prospective Section 8 developers:

> HUD was very anxious to get [the program] off the ground and it pointed out to developers at many meetings throughout the country of this marvelous rent devise [*sic*], of this escalation procedure where there would not be a cost review, but instead you would just go up by the market index capped only by comparability. [21]

In light of that description of HUD's promotional efforts by an informed industry representative, respondents' current claim that they anticipated automatic, above-market rent increases must be taken with a grain of salt.

C. The Rationale Of *Rainier View* Is Incorrect

Despite all of the foregoing, the *Rainier View* court concluded that HUD is prohibited from using comparability studies as an independent cap to the Adjustment

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[20] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 21 (1984) [1984 House Hearings] (emphasis added).

[21] 1984 House Hearings, *supra*, at 21 (testimony of Charles L. Edson).

Factors. That conclusion rests on a flawed interpretation of the contracts and the statutory scheme as a whole.

1. The premise of *Rainier View* is that if the "overall limitation" provision were read to authorize the use of separate comparability caps, it would nullify HUD's election, under Section 8(c)(2)(A) of the Act, to use a formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. must be read as a restriction on "the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991.

The *Rainier View* court erred in asserting that the use of comparability studies nullified HUD's election of the formula method. HUD's limited use of comparability studies did not abandon the Adjustment Factor approach. First, for all projects, the factor-based adjustment was HUD's starting point, and in the majority of cases, that was the ending point as well. Second, HUD's comparability studies differ significantly from the "fair market rental" (FMR) method, the alternative way to adjust rents described in Section 8(c)(2)(A). That method refers to the process for establishing the initial contract rent.[22] 42 U.S.C. 1437f(c)(1). HUD determines FMRs from surveys of rents in a large number of units in broad geographic areas.[23] See 24 C.F.R. 888.103; 53 Fed.

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[22] The statute states that the "maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market"; however, the maximum rent may exceed the FMR by up to 20 percent "where the Secretary determines that special circumstances warrant such higher maximum rent." 42 U.S.C. 1437f(c)(1). In addition, HUD regulations apply a rent-reasonableness test based on market comparisons. 24 C.F.R. 880.204(b)(1)(ii).

[23] HUD establishes FMRs for 344 geographic areas nationwide. The FMRs are derived from surveys of at least 12 recently constructed projects of each structural type of housing in a particular geographic area. Following the determination of those rents, HUD

Reg. 14,954 (1988). The comparability studies, in contrast, focus on three to five units comparable to a particular project in a relevant geographic area; they do not establish a rent level for a general area. HUD's limited use of comparability studies therefore did not constitute a switch to the "fair market rental" method and did not nullify the formula approach.

Not only was the court's nullification argument unfounded, the court failed to give effect to the plain language of the statute. To reiterate, the Act provided that "[a]djustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. 1437f (c)(2)(C) (1982). That provision operates as an overall constraint on rent adjustments, but does not impose a constraint on the means used by the Secretary to achieve the goal of comparability. Nothing in the statute required HUD to revise the formula, rather than to apply comparability studies directly to limit rents.[24] The court should therefore have applied the "overall limitation" as written: HUD may take any steps, "[n]otwithstanding any other provisions of this Contract," to avoid material differences in the adjustment of rents. Assistance Contract, § 1.9d.

2. The only other basis that the *Rainier View* court gave for its holding was a HUD regulation, 24 C.F.R. 888.204, that discusses interim revisions of the Adjustment Factors. 848 F.2d at 991.[25] That regulation, however, does not support the court of appeals' conclusion that HUD construed the statute as precluding use of a separate comparability cap. *Ibid.*

First, the regulation simply authorizes HUD to consider producing a revised interim adjustment factor; it does not compel HUD to take that approach in order to avoid "material differences." Rather than implementing the comparability requirement of the statute, the regulation exercises HUD's statutory authority to provide for formula-based adjustment of rents "annually or more frequently." 42 U.S.C. 1437f(c)(2)(A). Second, the regulation by its terms is not applicable when the Adjustment Factors are producing too *high* an adjustment; it applies only when the Adjustment Factors are producing too *low* an adjustment. Accordingly, the regulation was not promulgated to address the situation in this case (comparability studies that reveal excessive increases), and it did not restrict the agency's flexibility to deal with that problem.

Third, HUD has never interpreted 24 C.F.R. 888.204 in the fashion that the court of appeals suggested. Rather, another regulation, 24 C.F.R. 880.609(c)—which has always been part of the Section 8 program (see note 3, *supra*)—fully supports HUD's use of comparability studies. That regulation states, in pertinent part:

> *Overall limitation.* Any adjustment of contract rents for a unit after Contract execution * * * must

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sets FMRs at the 75th percentile of area rent levels, and trends the data ahead two years in order to reflect changes anticipated in those rents. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 656-657.

[24] To the extent that Section 8(c)(2)(C) is viewed as "ambiguous with respect to the specific issue" of whether a comparability study could be used as an independent limitation, HUD's interpretation of that language to authorize separate comparability caps is a reasonable one that is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843.

[25] The regulation states that when the Adjustment Factors would produce rents "that are substantially lower than rents charged for comparable units not receiving assistance" and a project owner establishes that "the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors," HUD "will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area." 24 C.F.R. 888.204 (reproduced in the appendix to this brief at 7a, *infra*).

> not result in material differences between the rents charged for assisted units and comparable unassisted units * * *.

That regulation confirms the agency's view that Section 8(c)(2)(A) authorizes an overall and independent comparability limitation on rent adjustments.

HUD's interpretation of its own regulations is entitled to great deference. See *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175-1176 (1990); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). The court of appeals violated that principle in imposing an interpretation on HUD that conflicts with the language and purpose of HUD's own regulation; ignores the agency's more relevant comparability rule; and contradicts the agency's long-held interpretation of its powers.

* * * *

In sum, *Rainier View*'s discovery of a contract right to formula-based rent increases without application of an independent comparability cap is fundamentally wrong. As a result, the court of appeals' holding that Section 801 is unconstitutional, which is predicated on the assumption that respondents had that contract right, is also wrong. Because respondents never had a contract right to be free from separate comparability studies, Congress infringed no contract rights by enacting Section 801.

II. IF SECTION 8 PROJECT OWNERS HAVE VESTED CONTRACT RIGHTS, SECTION 801 DOES NOT UNCONSTITUTIONALLY IMPAIR THEM

Even if the Assistance Contracts bore the meaning given them in *Rainier View*, the court of appeals' substantive due process holding—that Section 801 unconstitutionally impairs vested contract rights—could not stand. "For it is not every modification of a contractual promise that impairs the obligation of contract under federal law." *El Paso* v. *Simmons*, 379 U.S. 497, 506-507 (1965). Two further showings are necessary: the impairment must be substantial, and, if substantial, the impairment must be unjustified. *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985). In this case, neither showing has been made.

A. The Changes Made By Section 801 Do Not Substantially Impair Respondents' Rights

Section 801 is far from a wholesale repudiation of HUD's obligations to Section 8 project owners. The provision leaves intact the government's fundamental obligation to honor its contracts and to pay annual rent adjustments.[26] It also leaves intact the rules governing the ultimate amount of the payment to which Section 8 landlords are entitled—except on a retrospective basis, where Congress *increased* the amount of the payments that HUD must make. Against that background, even assuming the correctness of *Rainier View*, the incidental modifications of process and procedure made by Section 801 do not constitute substantial contractual impairments.

1. *Retroactive provisions.* For past periods the Reform Act improves the situation of owners whose rents were limited by comparability studies. Under Section 801(a), owners whose payments did not reach the full Adjustment Factor level because of comparability limits and owners who did not apply for adjustments because of a concern that rents would be reduced may apply to

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[26] Section 8 project owners retain their rights to (1) payment of the "lion's share" of rent by the government on behalf of project residents; (2) rent adjustments that preserve the initial difference between the contract rent and market rates when the contract was signed; (3) rent adjustments to reflect tax, utility, or other costs not adequately covered by market-based adjustments; and (4) assurances that the contract rent "will never drop below the original fixed rate." *Sheridan Square Partnership*, 761 F. Supp. at 746; 42 U.S.C. 1437f(c). All of those contract benefits and protections against market risk are left unaffected by Section 801.

HUD for retroactive payments. Such owners are guaranteed retroactive payments of no less than 30 percent of the Adjustment Factors, even where HUD's comparability studies indicated that comparable, unassisted units in the area had experienced lesser rent increases. Reform Act, § 801(a), 103 Stat. 2057-2058. That procedure is not burdensome to owners, and, more importantly, it puts them in a better financial position than their contracts guaranteed.[27]

Although respondents now claim the right to substantial windfall payments resulting from the full Adjustment Factor increase with no comparability limitation, that was not the right that their contracts, even as construed in *Rainier View*, conferred. The *Rainier View* court agreed with HUD that the agency was entitled to impose comparability limitations on rent adjustments; the disagreement was over the *procedure* by which HUD was required to take account of comparability. Although HUD's procedure was ultimately rejected by the Ninth Circuit, Section 8 project owners never had an expectation—under any view of the contracts—that the original Adjustment Factors would be applied if the Factors were deviating materially from rent increases at comparable unassisted projects. The only contractual expectation under their view was that HUD would have to modify the Factors to avoid such material differences.

Congress's requirement that HUD must retroactively modify its calculation of payments to owners is consistent with that contract-based right. Congress could have determined to restore the parties to the position they would have occupied had HUD complied with the *Rainier View* procedural approach all along, and thereby given re-

[27] Congress's decision to put the owners in a better position was likely a response to the owners' complaints that "HUD field offices applied inconsistent, unpredictable, and erratic procedures when assessing comparability and determining the proper amount of rent adjustments." *National Leased Housing Ass'n*, 22 Cl. Ct. at 657 n.7.

spondents all of the financial fruits that the contract provided.[28] Instead, Congress required HUD to make a *higher* payment to Section 8 project owners than the comparability studies indicated was appropriate. Because respondents' central right was to payment of a sum of money that was always limited by the standard of comparability, Section 801's requirement of a higher payment does not impair their substantial rights.[29]

2. *Prospective provisions.* For future periods, Section 801(c) requires HUD (where the agency has reason to believe that the formula adjustments are inaccurate) to use comparability studies to produce a modified adjustment factor for a smaller geographic area. That is a similar approach to what the *Rainier View* court had required HUD to do. Where that modification of factors is not feasible or fails to accomplish the objective of comparability, the statute permits HUD to use another method of applying comparability studies. The statute

[28] Indeed, if the *Rainier View* court had remanded to the agency for recomputation of payments to Section 8 owners under what the court saw as the correct approach (*i.e.*, by adjusting "the formula factors in light of market conditions," 848 F.2d at 991), respondents could not have complained: they would have received exactly what the contract (in their view) granted them. The court's failure to order such a remand does not mean that respondents had a contract-based entitlement to payment of a greater sum of money (*i.e.* the full Adjustment Factor formulas without any consideration of comparability); that was not the financial result for which they contracted.

[29] In granting supplemental payments to owners, Section 801(a) established the "exclusive method" for making retroactive payments, 103 Stat. 2058, and thereby foreclosed litigation over the methodology and results of past comparability studies. The termination of the right to litigate such administrative issues, in exchange for a significant additional payment to owners, is not the deprivation of a substantial right. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 & n.32 (1978).

does not specify that method.[30] Reform Act, § 801(c), 103 Stat. 2058. Respondents' substantial rights are not modified by those provisions.

As an initial matter, Congress has authority to legislate prospectively with respect to the administration of government contracts. This Court has noted that "sovereign power * * * is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (*POSSE*), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). In this case, neither respondents nor the court of appeals pointed to an "unmistakable" surrender of Congress's right to enact legislation affecting the Assistance Contracts. Section 8 owners, like participants in other federally subsidized housing programs, were well aware that the program was subject to congressional oversight and action. As this Court remarked about a similar housing program, "[t]hose who do business in the regulated field cannot object if the legislative scheme

[30] Rather than encourage separate comparability caps, Congress required HUD to report to it "on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents * * * on the basis of any alternative methodologies that are simpler in application than individual project comparability studies." § 801(f), 103 Stat. 2059. In response, HUD reported that (1) the Adjustment Factor system could be improved by conducting telephone surveys of the metropolitan and nonmetropolitan areas of the ten HUD regions; (2) it would be prohibitively expensive to collect highly localized CPI data or to survey areas not covered by CPI data to determine comparable rents; and (3) for certain individual projects, targeted comparability studies "carried out in an objective and uniform manner" can accurately identify material differences between comparable assisted and unassisted rents. HUD Report, *supra*, at 3-7. HUD's proposed regulations would implement the recommendations in the report. 57 Fed. Reg. 49,120 (1992). "Until a final rule is published on the future use of comparability studies, section 8 contract rents will be adjusted by applying the full [Adjustment Factors]." 56 Fed. Reg. 20,078 (1991).

is buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958).[31]

Moreover, in reaffirming the essential use of published adjustment factors to govern rent increases, and in requiring HUD to modify those factors based on comparability studies as the first-level response when factors are materially out-of-line with the rents at unassisted projects, the statute is entirely consistent with the contract rights respondents claim.[32] The only respect in which the statute alters those rights is by authorizing an alternative mechanism in the event that the modified factor fails. Even then, however, the statute does not alter the financial rights of owners under their contracts; the contract continues to give owners the right to annual rent adjustments, provided that they do not materially exceed rents at comparable unassisted projects.[33]

[31] In the *Sinking-Fund Cases*, 99 U.S. 700, 721 (1879), the Court stated that Congress "cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into." To the extent that that statement recognizes the prospective power of Congress to modify the government's contracts, it is consistent with the modern view of congressional authority. Developments in the law since the *Sinking-Fund Cases*, however, have made clear that the Due Process Clause does not totally bar legislation simply because it affects property rights retroactively. *General Motors Corp.* v. *Romein*, 112 S. Ct. at 1112; *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989).

[32] The statute also responds to owners' complaints about HUD's methodology, see note 27, *supra*, by requiring the agency to promulgate nationwide regulations to govern comparability studies, and by requiring that the studies must consider "the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area." § 801(c), 103 Stat. 2058.

[33] Acacia argues (Br. in Opp. 12) that, even if owners do not suffer financial injury under Section 801, "the owners would still be

Under those circumstances, a finding of substantial impairment would be possible only if the procedural provisions of a contract governing the adjustment of rents were of "constitutional dimension." *National R.R. Passenger Corp.*, 470 U.S. at 472. This Court, however, has never found that parties contracting with the government have a substantive due process right to be free from modifications in procedures such as those at issue here. The process and methodology for making rent-adjustments, independent of financial end-results, is not protected by the Fifth Amendment. See *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 310 (1989).[34] Thus, even on the

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damaged by having to submit to a cumbersome, arbitrary, time-consuming, and expensive process not provided for in their contract." But HUD has always had the right, even under the *Rainier View* interpretation of the contracts, to conduct comparability studies; the court of appeals held only that HUD was required to fold "those studies into the factors used to calculate the formula rent adjustments." Pet. App. 4a-5a. Thus, the new statute's provision for comparability studies imposes no novel process-related burdens. In any event, a claim that Section 801(c) might be implemented in a burdensome way is clearly not ripe; new program regulations have not been finalized and HUD has not conducted any comparability studies under its new criteria.

[34] In *Duquesne Light*, the Court rejected the claim under the Takings Clause that a utility could challenge "subsidiary aspects of [the State's] ratemaking methodology * * * piecemeal" when the utility was not harmed by the "net effect" of regulation. 488 U.S. at 313-314. The Court explained:

> [A]ll of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of [*FPC* v.] *Hope Natural Gas*[, 320 U.S. 591, 602 (1944)]: "[I]t is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

Id. at 310; see also *id.* at 317 (Scalia, J., concurring) (endorsing constitutional rule for ratemaking that "looks to the consequences

view that Section 801 alters the Assistance Contracts, the "alteration of contractual obligations is minimal"; therefore, the due process "inquiry may end at this stage." *National R.R. Passenger Corp.*, 470 U.S. at 472.

B. To The Extent That Respondents' Rights Are Substantially Impaired, Congress's Action Is Justified Under The Due Process Clause

When Congress enacts economic regulation that impairs private contracts, it is well established that review of such impairment "is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way." *National R.R. Passenger Corp.*, 470 U.S. at 472 (internal quotation marks omitted); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Retroactive legislation is governed by the same due process principle; it is valid if the law's retroactive application is "justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 493 U.S. 52, 64 (1989), quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

When, as here, the contract alleged to be impaired is the federal government's own, the Court has suggested that the Due Process Clause may "warrant[] application of [a] more rigorous standard of review" because of the need to "maintain the credit of public debtors" and

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a governmental authority produces rather than the techniques it employs"). The issue of whether respondents have been deprived of their property without due process is analogous to the issue of whether it has been taken without compensation under the Takings Clause. See *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-224 (1986). As in the Takings context, the congressional modification of payment procedures does not have a "substantial" impact on property rights, when the net economic outcome is unchanged.

because the government's "self-interest is at stake." *National R.R. Passenger Corp.*, 470 U.S. at 471-472 & n.24; see also *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 n.25 (1977). As the Court has explained, "Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money." *POSSE*, 477 U.S. at 55, citing *Lynch* v. *United States*, 292 U.S. 571, 580 (1934); *Perry* v. *United States*, 294 U.S. 330, 350-351 (1935).[35]

Under those principles, Congress's enactment of Section 801 is constitutional. The statute is neither arbitrary nor irrational in light of Congress's purpose to respond to *Rainier View* by reinstating the market-rent approach of the Section 8 program. And, to the extent any inquiry into the legitimacy of Congress's purpose is warranted, the legislation in this case was not simply aimed at saving money; rather, it was a measured response to the disorder in the Section 8 program created by the decision in *Rainier*

[35] The Court has described a different standard for reviewing state legislation under the Contract Clause, Art. I, § 10, Cl. 1 ("No State shall * * * pass any * * * Law impairing the Obligation of Contracts."). In that context, the Court has indicated that, to withstand constitutional scrutiny, state legislation impairing state debt contracts must be "reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 25. The Contract Clause standard is not applicable here. "As we made clear in *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S., at 732-733, we have never held that the principles embodied in the Fifth Amendment's due process guarantee are coextensive with the prohibitions against state impairment of contracts under the Contract Clause, and, we observed, to the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation." *National R.R. Passenger Corp.*, 470 U.S. at 472 n.25. The Court has declined to transpose Contract Clause principles to the federal government in part because "records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. at 732 n.9.

View and was designed to reinforce, and to restore on a national level, the premises of that public welfare program. Thus, even assuming substantial impairment of contracts, Section 801 is constitutional.

1. *Curative legislation principles apply here*

a. As this Court reaffirmed just last Term, a legislature may permissibly respond to the "unexpected results" of a judicial decision by restoring the legal regime that had previously been understood to prevail. *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). In *Romein*, the Court rejected a due process challenge to a state law that retroactively adjusted payments owed to injured workers in order to "preserve[] the delicate legislative compromise that had been struck" in a prior workers' compensation statute, after the state supreme court had rendered an unanticipated construction of the law. 112 S. Ct. at 1112. Other decisions have likewise upheld curative legislation against due process challenges. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 57-58 (1989); *Opdyke Investment Co.* v. *Detroit*, 883 F.2d 1265, 1274-1276 (6th Cir. 1989); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259-261 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

The Court has upheld curative legislation even when it extinguishes "vested rights" against the government. In *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931), the Court approved of a "curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."[36] The Court rejected the claim that the statute

[36] There, the IRS had failed to institute distraint proceedings to collect taxes within five years of the filing of a return, in reliance on its view that the five-year limitations period applied only to judicial collection actions. After this Court ruled in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (1927), that the limitations period also applied to distraint proceedings, taxpayers

infringed vested rights, stating that "[w]here the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist." 282 U.S. at 429.

In this case, the court of appeals believed that Congress's power to enact curative legislation extends only to the correction of statutory holdings and the withdrawal of gratuitous benefits, not to the alteration of "vested rights." Pet. App. 10a-12a. This Court, however, has never so limited the scope of curative legislation; rather, it applied the doctrine in rejecting a "vested rights" claim in *Graham & Foster* v. *Goodcell*, *supra*. Curative legislation is constitutionally reasonable because it responds to an unexpected interpretation of rights, and provides a fair remedy that is consistent with the overall legislative purpose. There is no basis for excepting legislation affecting government contracts from that general principle.

b. Section 801 is rational curative legislation. In reliance on its understanding of the statute and contracts, HUD for years had adjusted rents through separate comparability caps rather than by altering its formulas in light of comparability studies. The unexpected decision in *Rainier View* upset that scheme of administration and resulted in the prospect of substantial windfalls for Section 8 project owners. In response to the court's unanticipated reading of the contracts, Congress moved to protect the original market-rent premise of the Section 8 program, see S. Rep. No. 693, 93d Cong., 2d Sess.

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brought suit to collect refunds to which they were statutorily entitled. In response, Congress enacted Section 611 of the Revenue Act of 1928, ch. 852, 45 Stat. 875, to prevent the payment of such refunds. *Graham & Foster*, 282 U.S. at 413-414, 416-418.

45-46 (1974), and reaffirmed the basic comparability test.

Those facts illustrate the reasons for viewing curative legislation as permissible under the Due Process Clause. Project owners long knew of HUD's position that separate comparability caps were permissible. They were well aware from the Housing and Community Development Act of 1987 that Congress shared that view. See note 5, *supra*. At the very least, the contract language made that position a reasonable one; it should therefore have come as no surprise to project owners that Congress would react to *Rainier View*.[37]

The *Rainier View* decision left some owners with a claim to *above*-market rent adjustments despite the fact that the Section 8 program was clearly designed to provide prevailing market rents. If HUD had incorporated comparability studies into the Adjustment Factors, as *Rainier View* later required, respondents would not have received rents materially above a comparable level; yet that is what they now claim. Congress acted reasonably in remedying the excessive adjustments produced by the agency's "defect in administration." *Graham & Foster* v. *Goodcell*, 282 U.S. at 429; cf. *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990). It also acted reasonably in providing a sound footing for future administration of the program.

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[37] Furthermore, the contractual holding of *Rainier View* was predicated on a mistaken interpretation of the underlying statute. 848 F.2d at 991 (interpreting the contract's "overall limitation" provision, "consistent with its statutory analog, * * * [as] clearly a limitation on the calculation of the formula[,] * * * not an independent basis for making annual rent adjustments"); see also note 4, *supra* (court of appeals noted that the claim in *Rainier View* "rests at bottom on statutory or regulatory rights"). When a court interprets a contract in reliance on its understanding of a statute, Congress may permissibly respond to that holding by correcting what it perceives to be a dual error.

As this Court has noted "[l]aws which restrict a party to those gains reasonably to be expected from the contract" are not unconstitutional, "notwithstanding that they technically alter an obligation of a contract." *El Paso* v. *Simmons*, 379 U.S. at 515.[38] In the context of the Section 8 program, Congress acted rationally in responding to *Rainier View* by reestablishing a mechanism to avoid excessive rent adjustments.

2. *The "vested rights" doctrine is inapplicable*

In striking down Section 801, the court of appeals concluded that Congress's purpose in enacting the legislation was "solely to save money" and that the law therefore infringed "vested rights" under *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Pet. App. 14a. The court of appeals' holding misconceives the purposes for which Congress acted, and expands *Lynch* and *Perry* far beyond their proper scope.

a. The situation that Congress confronted after *Rainier View* was one of greater disorder in the Section 8 program that was detrimental to the program's purpose. Although Section 8 is a national social-welfare program, designed to provide market-level rents subsidies under uniform criteria, project owners in the Ninth Circuit were able to claim what HUD and Congress perceived as excessive rental adjustments for the past. Moreover, such windfalls would continue unless HUD under-

[38] In *El Paso*, the Court upheld a Texas law shortening the time within which land purchasers from the State could reinstate their rights to land previously forfeited due to failure to pay interest. Even though that restriction resulted in a complete loss of contract rights upon the expiration of the shortened period, this Court held that it did not violate the Contract Clause, because the unanticipated development of speculation in land had made it important for Texas to shorten the redemption period, and the purchasers could not reasonably have expected that the right of redemption would be perpetual. 379 U.S. at 513-517.

took the complicated and burdensome task of developing a new adjustment system to comply with the *Rainier View* ruling.

Even if HUD performed that task, the national uniformity of the program would still be disrupted, because project owners in different jurisdictions, who were not entitled to claim the benefit of *Rainier View*, continued to challenge HUD's methodology and right to use separate comparability caps. It was uncertain what requirements, if any, those courts would impose on HUD. In the meantime, annual rent adjustments at thousands of projects were subject to inconsistent procedures based solely on a project's location. See National Leased Housing Ass'n Amici Br. 3-6 (dated Oct. 26, 1992).

To restore uniform procedures in the Section 8 program and to rectify the mistaken *Rainier View* holding, Congress enacted Section 801. Members of Congress expressed the view that the *Rainier View* decision was wrong. See note 7, *supra*. They rejected, however, the alternative of saddling the Section 8 program with years of litigation and inconsistency in the rent adjustment process. Instead, Congress proposed Section 801, finding that "[b]y * * * making the statutory standards for applying comparability more concrete" and "further requiring HUD to promulgate regulations for future year rent adjustments, this amendment should eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato).

In light of the significant threats to the proper operation of the Section 8 program, Congress was not powerless to enact reasonable measures, in line with the Act's original premises, to reestablish national standards. It is true that some legislators noted that Section 801 would save the government money that would otherwise be due if *Rainier View* were the final word. See, *e.g.*, 135 Cong. Rec. H9,686 (daily ed. Nov. 21, 1989) (remarks of Rep. Gonzalez); *id.* at S16,607 (remarks of Sen. Sasser). But

the overall legislation is not simply an economy measure. Congress granted financial rights to the owners that they would not have otherwise had [39] and tailored the statute to answer the owners' administrative complaints about comparability studies.[40] Such congressional action was necessary to break the logjam created by *Rainier View* and to restore a proper basis for adjusting rents. The Due Process Clause does not prevent Congress from enacting such reforms in regulating its welfare programs.

b. The notion that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights," and that such vested rights cannot be abrogated solely to save the government money, *POSSE*, 477 U.S. at 52, 55, stems from this Court's decisions in *Lynch* v. *United States*, *supra*, and *Perry* v. *United States*, *supra*. Those cases, however, do not apply here.[41]

In *Lynch*, the Court considered a law that repealed the government's obligation to pay benefits on "War Risk" life insurance policies issued during World War I for which premiums had already been paid. 292 U.S. at 579-580. The Court noted that because Congress had the power to authorize the issuance of the policies, "the due

[39] The Reform Act provides a higher retrospective payment to owners than the results of comparability studies would have allowed, regardless of the circuit in which the project is located. See note 27 and accompanying text, *supra*. Congress has appropriated $210 million to fund those payments. See note 10 and accompanying text, *supra*.

[40] The Reform Act limits HUD's resort to comparability studies, required the agency to look into the feasibility of using other methods, and compels it to promulgate regulations to ensure consistency and fairness in the determination of comparable rents. See note 30 and accompanying text, *supra*.

[41] In *POSSE*, the Court's description of *Lynch* and *Perry* was dictum. That case held that when Congress eliminated the States' contractual right to withdraw from the federal Social Security program, the contractual right lost did not "rise to the level of 'property' " under the Fifth Amendment. 477 U.S. at 55.

process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." *Id.* at 579. The Court found, however, that Congress had not faced any "supervening conditions" that authorized it to abrogate the contracts. *Id.* at 579-580. Rather, the law in question, which was "popularly known as the Economy Act," represented an attempt to "lessen government expenditure." *Id.* at 580. The Court concluded that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Ibid.*

Lynch is distinguishable from this case. First, unlike in *Lynch*, Congress did not entirely abrogate its contracts in enacting Section 801. The project owners retain the core economic features of their bargain, and the obligation of their contracts continues in force. As in the related Fifth Amendment Takings context, the complete abrogation of a party's economic rights through regulation raises different, and more serious, concerns than regulation that merely alters those rights. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-2894 (1992); cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Second, the Court in *Lynch* saw no congressional justification for the interference with contract rights other than to lessen government expenditures; there were no "supervening conditions" implicating the police power. 292 U.S. at 579.[42] In this case, however, Congress was responding to the confusion engendered by *Rainier View*, and was seeking, as in *POSSE*, to reform "a comprehensive social welfare program affecting millions of individuals." 477 U.S. at 53. Those purposes provide legitimate justifications for Section 801 that were absent in *Lynch*.

In *Perry*, the government had issued bonds "payable in United States gold coin of the present standard of

[42] The examples the Court gave of such conditions represented ordinary uses of the commerce power. See *Lynch*, 292 U.S. at 579

value." 294 U.S. at 347. After issuance of the bonds, Congress passed a resolution stating that provisions requiring payment in "gold or a particular kind of coin or currency" were against public policy and were dischargeable only with legal tender. *Id.* at 349. When the government, pursuant to the resolution, refused to redeem the bonds except by paying their face value in legal tender currency, the bondholder sought damages based on the dollar value of the amount of gold contained in the gold coins he had been promised. *Id.* at 347, 355.

The Court held that the resolution invalidating a term on which the government had borrowed money was unconstitutional, because Congress's power to borrow money "on the credit of the United States," 294 U.S. at 350, entails the power to make a binding promise that a subsequent Congress cannot "alter" or "destroy." *Id.* at 353-354.[43] Nevertheless, the Court determined that the bondholder could not recover damages. *Id.* at 357-358. As Justice Stone's concurrence explained, the plaintiff was

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n.7, citing *Lottery Case*, 188 U.S. 321, 363-364 (1903) (Congress has the power to prohibit interstate transfer of lottery tickets); *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 58 (1911) (upholding Congress's power to seize and condemn adulterated food); *Hoke* v. *United States*, 227 U.S. 308, 323 (1913) (upholding statute prohibiting interstate "White Slave" traffic); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156-157 (1919) (upholding wartime prohibition measure); *Calhoun* v. *Massie*, 253 U.S. 170, 175 (1920) (upholding law invalidating contracts for attorney's fees in veterans' cases). In *Massie*, the Court cited all of those cases for the proposition that "[a]n appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results." 253 U.S. at 175.

[43] The Court also relied on the provision of the Fourteenth Amendment that "[t]he validity of the public debt of the United States, authorized by law, * * * shall not be questioned." U.S. Const. Amend. XIV, § 4. 294 U.S. at 354. The Court did not rely on the Due Process Clause.

not damaged "because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the Government." 294 U.S. at 360.

Perry does not assist the respondents in this case. The proposition embraced in *Perry* was that "when the Government borrows money, the credit of the United States is [not] an illusory pledge." 294 U.S. at 350. That proposition is not applicable here, because this case does not involve the government's repudiation of a debt incurred under the constitutional power to borrow money. Moreover, *Perry*'s actual holding is narrower than its language would suggest, for what the Court gave the bondholder in upholding his contract claim, it took away in rejecting his request for damages.[44] *Perry* should not be extended beyond its unusual facts to encompass the vastly different context surrounding Congress's enactment of Section 801.

Section 801 constitutes an intricate adjustment of the payment provisions in a comprehensively regulated low-income housing program. The statute eliminates the unforeseen obstacle that *Rainier View* had put in the way of Congress's original policy and restores uniformity to the program's operation. Because Congress had valid regulatory purposes quite apart from saving the government money, Section 801 does not violate the Due Process Clause.

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[44] *Perry* repeatedly characterized the government's obligations as having a "binding quality." 294 U.S. at 349, 351, 353-354. But in ruling that Congress's paramount power to regulate currency trumped the plaintiff's right to obtain the gold coin he was promised (or its equivalent in currency), the Court gave substantial deference to Congress's underlying policy of eliminating gold coin as a medium of exchange.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057-2059, provides:

SEC. 801. ANNUAL ADJUSTMENT FACTORS FOR SECTION 8 RENTS

(a) **Effect of Prior Comparability Studies.—**

(1) **In General.**—In any case in which, in implementing section 8(c)(2) of the United States Housing Act of 1937—

(A) the use of comparability studies by the Secretary of Housing and Urban Development or the appropriate State agency as an independent limitation on the amount of rental adjustments resulting from the application of an annual adjustment factor under such section has resulted in the reduction of the maximum monthly rent for units covered by the contract or the failure to increase such contract rent to the full amount otherwise permitted under the annual adjustment factor, or

(B) an assistance contract requires a project owner to make a request before becoming eligible for a rent adjustment under the annual adjustment factor and the project owner certifies that such a request was not made because of anticipated negative adjustment to the project rents.

for fiscal year 1980, and annually thereafter until regulations implementing this section take effect, rental adjustments shall be calculated as an amount equal to the annual adjustment factor multiplied by

a figure equal to the contract rent minus the amount of contract rent attributable to debt service. Upon the request of the project owner, the Secretary shall pay to the project owner the amount, if any, by which the total rental adjustment calculated under the preceding sentence exceeds the total adjustments the Secretary or appropriate State agency actually approved, except that solely for purposes of calculating retroactive payments under this subsection, in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment factor multiplied by the full contract rent for each year on or after fiscal year 1980, minus the sum of the rental payments the Secretary or appropriate State agency actually approved for those years. The method provided by this subsection shall be the exclusive method by which retroactive payments, whether or not requested, may be made for projects subject to this subsection for the period from fiscal year 1980 until the regulations issued under subsection (e) take effect. For purposes of this paragraph, "debt service" shall include interest, principal, and mortgage insurance premium if any.

(2) **Applicability.—**

(A) **In General.**—Subsection (a) shall apply with respect to any use of comparability studies referred to in such subsection occurring before the effective date of the regulations issued under subsection (e).

(B) **Final Litigation.**—Subsection (a) shall not apply to any project with respect to which litigation regarding the authority of the Secretary to use comparability studies to limit rental adjustments under section 8(c)(2) of the United States Housing Act of 1937 has resulted in a

judgment before the effective date of this Act that is final and not appealable (including any settlement agreement).

(b) **3-Year Payments.**—The Secretary shall provide the amounts under subsection (a) over the 3-year period beginning on the effective date of the regulations issued under subsection (e). The Secretary shall provide the payments authorized under subsection (a) only to the extent approved in subsequent appropriations Acts. There are authorized to be appropriated such sums as may be necessary for this purpose.

(c) **Comparability Studies.**—Section 8(c)(2)(C) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(C)) is amended by inserting after the period at the end of the first sentence the following: "In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secre-

tary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units."

(d) **Determination of Contract Rent.**—(1) The Secretary shall upon the request of the project owner, make a one-time determination of the contract rent for each project owner referred to in subsection (a). The contract rent shall be the greater of the contract rent—

(A) currently approved by the Secretary under section 8(c)(2) of the United States Housing Act of 1937, or

(B) calculated in accordance with the first sentence of subsection (a)(1).

(2) All adjustments in contract rents under section 8(c)(2) of the United States Housing Act of 1937, including adjustments involving projects referred to in subsection (a), that occur beginning with the first anniversary date of the contract after the regulations issued under subsection (e) take effect shall be made in accordance with the annual adjustment and comparability provisions of sections 8(c)(2)(A) and 8(c)(2)(C) of such Act, respectively, using the one-time contract rent determination under paragraph (1).

(e) **Regulations.**—The Secretary shall issue regulations to carry out this section and the amendments made by this section, including the amendments made by subsection (c) with regard to annual adjustment

factors and comparability studies. The Secretary shall issue such regulations not later than the expiration of the 180-day period beginning on the date of the enactment of this Act.

(f) **Report.**—Not later than March 1, 1990, the Secretary shall report to the Congress on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents under section 8(c)(2)(C) of the United States Housing Act of 1937 on the basis of any alternative methodologies that are simpler in application than individual project comparability studies.

(g) **Technical Amendment.**—The first sentence of section 8(c)(2)(C) of the United States Housing Act of 1937 is amended by inserting ",type," after "quality".

Section 8(c)(2) of the United States Housing Act of 1937, 42 U.S.C. 1437f(c)(2) (1982), as added by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, Tit. II, § 201(a), 88 Stat. 663, provides in relevant part:

(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs

which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

24 C.F.R. 880.609 and 888.204 provide:

§ 880.609 Adjustment of contract rents.

(a) *Automatic annual adjustment of Contract Rents.* Upon request from the owner to the contract administrator, contract rents will be adjusted on the anniversary date of the contract in accordance with 24 CFR part 888.

(b) *Special additional adjustments.* For all projects, special additional adjustments will be granted, to the extent determined necessary by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units which have resulted from substantial general increases in real property taxes, assessments, utility rates, and utilities not covered by regulated rates, and which are not adequately compensated for by annual adjustments under paragraph (a) of this section. The owner must submit to the contract administrator required supporting data, financial statements and certifications.

(c) *Overall limitation.* Any adjustments of contract rents for a unit after Contract execution of cost certification, where applicable, must not result in material differences between the rents charged for assisted units and comparable unassisted units except to the extent that the differences existed with respect

to the contract rents set at Contract execution or cost certification, where applicable.

§ 888.204 Revision to the automatic annual adjustment factors.

If the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act of 1937 in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area. Any request for revision of the factors must be accompanied by an identification of the area, its boundaries and evidence that the area constitutes the largest contiguous area in which substantially the same rent levels prevail. The HUD Field Office will publish appropriate notice of the establishment of any such revised Automatic Annual Adjustment Factors. These factors will remain in effect until superseded by the subsequent publication of Automatic Annual Adjustment Factors pursuant to § 888.202.

Representative rent adjustment provision: Original Version of Assistance Contract.

1.9 RENT ADJUSTMENTS

a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Section 1.6a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (*i.e.*, assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Notwithstanding any other

provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

Representative rent adjustment provision: post-1980 Assistance Contract

2.7 RENT ADJUSTMENTS.

(a) *Funding of Adjustments.* Housing assistance payments will be made in amounts commensurate with Contract Rent adjustments under this section up to the maximum amount authorized under section 2.3(a) of this Contract.

(b) *Annual Adjustments.*

(1) Upon request from the Owner to the CA, Contract Rents will be adjusted on the anniversary date of the Contract in accordance with 24 CFR 888 and this Contract. See, however, paragraph (d).

(2) In the case of previously HUD-owned projects, the Contract Rents shall be adjusted in accordance with 24 CFR 886, Subpart C and this Contract.

(3) Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the annual adjustment result in Contract Rents less than the Contract Rents on the effective date of the Contract.

(c) *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, assessments, and utilities not covered by regulated rates. The Owner must demonstrate that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by annual adjustments. The Owner shall submit to HUD supporting data, financial statements and certifications which clearly support the increase. See, however, paragraph (d).

(d) *Overall Limitation.* Notwithstanding any other provision of this Contract, adjustments after Contract execution or cost certification, where applicable, shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by HUD; except to the extent that the differences existed with respect to the Contract Rents set at Contract execution or cost certification, where applicable.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ACACIA VILLA, ET AL.

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QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, is an unconstitutional attempt by Congress to save money by legislatively abrogating express provisions of contracts of the United States to which the United States solemnly pledged its faith and for which the private parties paid independent consideration?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the Brief for the Petitioners, Acacia Villa, a California general partnership, is a party to these proceedings.

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BRIEF OF RESPONDENTS ACACIA VILLA, ET AL.

STATEMENT OF THE CASE

These cases were decided on cross-motions for summary judgment. The courts below ruled for the owners in light of the facts contained in uncontroverted affidavits and other elements of the record now before this Court. The United States Department of Housing and Urban Development's ("HUD") Statement of the Case ignores or contradicts this record and omits material facts concerning the Section 8 program. To provide the Court with the background necessary for review of the decisions below, Acacia Villa presents this Statement of the Case.

I. AUTOMATIC ADJUSTMENTS ARE A CENTRAL FEATURE OF THE SECTION 8 PROGRAM AND OF THE HAP CONTRACTS

Congress created the Section 8 program in 1974 by enacting Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f (1976), to cure the defects of its immediate predecessor, the Section 236 low-income housing program. Under the Section 236 program, HUD provided developers a fixed subsidy in the form of reduced mortgage rates. Rent adjustments for increased costs under Section 236 were based on case-by-case review by HUD. The procedures HUD used for determining rent increases under Section 236 were arbitrary; they did not yield a fair rate of return; they cost owners large amounts of time and money; they were open to subjective manipulation by HUD employees; and they were slow. Declaration of Jona Goldrich (May 30, 1990) ¶ 3 ("Goldrich Declaration"), J.A. at 36. As a result, rents lagged well behind actual changes in costs. *Id.* Because of rapid inflation in the late sixties and early seventies, these problems became so severe that they contributed to the bankruptcy of many Section 236 projects.[1]

In the Section 8 program, HUD pays the owner a flexible subsidy which is calculated as the difference between the rent paid by the tenant (a statutory percentage of his or her income) and the "Contract Rent." The initial Contract Rent negotiated between HUD and the owner was incorporated into a Housing Assistance Payments Contract ("HAP Contract") between HUD and the owner.[2] In marked contrast to the predecessor Section

[1] During the 1973 Congressional hearings that led up to the enactment of the Section 8 program, the Secretary of Housing and Urban Development predicted foreclosure over the next decade of 20% of the Section 236 projects. *Administration's 1973 Housing Proposals: Hearings on S.2490, S.2507 and S.2508 before the Committee on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 10 (1973) (statement of James T. Lynn, Secretary of Housing and Urban Development).

[2] The statute provided that the initial Contract Rent could exceed the "Fair Market Rental" for moderate and low income housing of the same size and type in the market area, but not by more than 20%. 42 U.S.C. § 1437f(b)(1976). HUD regulations also required that Contract Rents be "reasonable." 24 C.F.R. § 880.204 (1992). Rents were considered reasonable if they exceeded by no more than 20% the amount determined by HUD on the basis of market comparisons with unassisted units of similar age, design and location which provided comparable amenities and services, and the excess was warranted by cost and expense estimates and cost certification. 24 C.F.R. § 880.204(b)(1)(ii) (1992). These guidelines left HUD with considerable leeway to negotiate Contract Rents at a level sufficient to make the projects feasible.

236 program, the statute provides two methods for adjusting the Contract Rent to compensate for inflation in subsequent years: (1) "changes in fair market rentals" or (2) a "reasonable formula." 42 U.S.C. § 1437f(c)(2)(A) (1976).[3] Both methods of rent adjustment are based on widely-applicable, publicly-scrutinized data. The reasonable formula method further limits the opportunities for bureaucratic meddling and manipulation, basing rent adjustments on a published Automatic Annual Adjustment Factor ("AAAF"). The AAAFs are developed by HUD's Office of Economic Affairs using data derived from the Consumer Price Index and from the American Housing Survey conducted by the Bureau of the Census. Declaration of David E. Shenk (Nov. 14, 1990), J.A. at 50. AAAFs are, or should be, published for comment.[4]

In order to provide maximum assurances to potential developers of Section 8 housing that the Section 8 program would be entirely different from the discredited Section 236 program, HUD agreed in the HAP Contracts to use the "reasonable formula" method to adjust rents "by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." HAP Contract § 1.9(b)(2). In

[3] Special "additional adjustments," not at issue in this proceeding, are provided for in 42 U.S.C. § 1437f(c)(2)(B) (1976).

[4] HUD in fact often fails to publish AAAFs for comment, but admits that it should do so. 44 Fed. Reg. 65,924 (1979).

the summary judgment proceedings below, plaintiffs established by undisputed affidavits that HUD both understood and marketed the Section 8 program as one in which rents would be adjusted by applying a published adjustment factor, rather than on a case-by-case basis. Affidavit of Dean Chaussee (Apr. 6, 1990) ¶¶ 7-8 ("Chaussee Affidavit"), J.A. at 27-29. It was also undisputed that owners "participated in the Section 8 program only because the Section 8 HAP contracts, unlike the Section 221(d)(3) and Section 236 program contracts, provided for rent adjustments to be computed at least annually according to an equitable, timely and simplified formula to be published in the *Federal Register*." Goldrich Declaration ¶ 3, J.A. at 36.[5]

The statute, in a separate sub-section, limits the amount of adjustments. Whether made by "changes in fair market rentals" or by a "reasonable formula," adjustments are not to lead to "material differences between the rents charged for assisted and comparable unassisted units." 42 U.S.C. § 1437f(c)(2)(C) (1976). The "overall limitation" provision of the HAP Contracts, § 1.9(d), echoes this statutory command. HUD reads into this limitation clause authority for HUD to scrap the automatic formula method provided in the HAP Contracts and to substitute an entirely different case-by-case methodology for adjusting rents not provided for in the statute or in the contracts. HUD Brief at 8, 13, 16, 17, 19, 26. The owners contend, as the Court of Appeals for the Ninth Circuit held, that while the limitation

[5] HUD now attempts to contradict these facts by quoting snippets of testimony given in Congressional hearings years after the HAP Contracts were signed by a person who is not a party to the litigation. HUD Brief at 23-24. The passages HUD quotes do not support HUD's position. They merely state that Contract Rents are not to be materially different from those for comparable unassisted units. They do not suggest that in implementing this provision HUD is free to abandon the formula method. In any case, HUD did not contest the plaintiffs' factual allegations in the summary judgment proceedings and may not do so now. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).

requires HUD to modify the applicable AAAF when necessary to avoid such material differences, the limitation does not allow HUD to substitute an entirely different methodology of making adjustments for that provided in the contracts.

II. FOR MANY YEARS HUD IMPLEMENTED THE LIMITATION IN ACCORD WITH ITS CONTRACTUAL OBLIGATION TO USE A FORMULA TO ADJUST RENTS

From the beginning of the Section 8 Program, HUD was aware of the possibility that variances within the market area could cause Section 8 rents adjusted by the AAAF to differ materially from the rents for comparable unassisted units in certain sub-markets. HUD responded to that possibility until the early 1980s in the way required by the HAP Contracts, *i.e.*, by checking that the AAAFs were producing appropriate adjustments and by preparing separate AAAFs for any sub-market in which the AAAF for the larger market would produce inappropriate adjustments. When it published AAAFs in 1976, HUD requested comments "on alternate approaches or data sources which could provide information on smaller sized areas than those being published at this time." 41 Fed. Reg. 49,440 (1976). In response to the comments received, HUD announced that "additional Adjustment Factors will be published where market conditions indicate a need to publish factors for particular areas." 42 Fed. Reg. 60,508 (1977); *see* 24 C.F.R. § 888.202 (1977).[6] HUD Handbook 7420.1, *Section 8 Housing Assistance Payments Program New Construction Processing Handbook* (1975) ("HUD Handbook") instructed HUD field offices to "review the accuracy of the rent adjustment to ensure that it is comparable (neither too high nor too low) in relationship to similar assisted or unassisted units." HUD Handbook

[6] The current regulations continue to foresee publication by HUD of "revised factors applicable only to specific areas." 24 C.F.R. § 888.202 (1992).

§ 7-8(a)(4). If the study showed that the rent adjustments were not accurate, the HUD Handbook required preparation of a revised factor: "If the adjustment is not comparable, the AHM Branch shall revise the factor." *Id.*

In the early 1980s, in response to pressure to cut rents, or at least slow their increase well below the level of inflation, HUD devised several expedients. HUD attempted to circumvent the HAP Contracts, that called for rents to rise automatically with inflation in rental levels, by proposing regulations that would have required rent increases to be calculated by applying a factor designed to reflect increases in operating costs to the contract rent less debt service. This not very subtle way of shifting the burden of inflation from HUD to the owners provoked the following comments from the Chairman of the House Subcommittee on Housing and Community Development:

> I recognize that the Department is undoubtedly being directed to stick by its guns through the orders of the Office of Management and Budget. But it is a sorry day when any agency of the Government, in the name of economy, stands ready to corrupt contracts, vitiate and violate the law, and generally operate in a style more appropriate to a small-time dictatorship.[7]

Under fire, HUD abandoned the proposal for cost-based adjustments, but the change from the automatic formula rent adjustments required by the HAP Contracts to case-by-case adjustments carried out by HUD field offices is merely another illegal attempt to shift the burden of inflation from HUD to owners.

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[7] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearings before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. at 2 (1984) (remarks of Mr. Gonzalez).

III. HUD IS ATTEMPTING TO AVOID ITS OBLIGATIONS, NOT WINDFALLS

Throughout its brief, HUD seeks to portray the owners as rapacious landlords attempting to reap windfall profits by collecting rents higher than those for "comparable unassisted units."[8] HUD also argues repeatedly that owners cannot have been harmed by "comparability studies" because owners are not entitled to rent higher than that for comparable unassisted units.[9] These two assertions constitute the underpinning of HUD's entire argument.

HUD's assertions derive whatever surface plausibility they may have from the stroke of genius of the HUD official who invented the name "comparability studies" for HUD's case-by-case adjustments of rent. The name suggests a scientific process that determines objectively and with a high degree of accuracy the rent for a fully comparable unassisted apartment. Nothing could be further from reality.

If the rents HUD is paying under its "comparability studies" were actually market rents for units with comparable features and comparable construction and operating costs, the owners of Section 8 projects would not now be in dire financial straits. Plaintiffs in *Alpine Ridge Group v. Kemp*, 764 F. Supp. 1393 (W.D. Wash. 1990), *aff'd*, 955 F.2d 1382 (9th Cir.), *cert.*

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[8] *See* HUD Brief at 24 (owners claim "above-market rent increases"), 30 (owners claim "substantial windfall payments"), 31 n.28 ("*Rainier View* gave owners rent for which they did not contract").

[9] *See* HUD Brief at 13 (Section 801 leaves the owners' economic rights intact), 22 (no matter what methodology HUD employs, the bottom line for the owners would be the same), 29 (Section 801 leaves intact rules governing amount project owners are entitled to, except retroactively where Congress increased the amount of payments HUD must make), 30 (Section 801 puts owners in better financial position than their contracts require), 31 (Section 801 requires HUD to pay an amount greater than that for comparable unassisted units), 33 (statute does not materially alter owners' rights).

granted, 113 S. Ct. 490 (1992) established by unopposed affidavits that seventy-five percent of project owners were receiving no return on their time and investment, Declaration of Janet Marie (May 31, 1991) ¶ 8, J.A. at 56. The *Alpine Ridge* court found that, far from enjoying windfall profits, many owners teeter on the edge of bankruptcy. *Alpine Ridge Group v. Kemp*, Order Denying Defendants' Motion for Stay Pending Appeal (*Alpine* Clerk's Document No. 111, May 21, 1991). The *Acacia Villa* plaintiffs established that owners face the specter of serious financial difficulties in making repairs and providing necessary security measures. Goldrich Decl. ¶ 23, J.A. at 42-43. The ultimate victims of all this are the tenants. HUD simply ignores these uncontroverted facts when it inveighs against imaginary windfalls.

A. "Comparability Studies" Are Inherently Subjective And Imprecise

It is critical to the understanding of this case that the Section 8 program required Section 8 apartments to differ in material ways from unassisted low and moderate income apartments produced by the market. Section 8 was intended to put an end to government-sponsored ghettos for poor people. Section 8 apartments were, therefore, often built in neighborhoods where land values are higher than those in neighborhoods where most unassisted low and moderate income apartments are located. Chaussee Aff. ¶ 10, J.A. at 30-31. In addition, HUD regulations required Section 8 buildings to have numerous costly features not found in other moderate and low income housing (*e.g.*, fire rating and alarm systems, and multi-purpose areas, emergency call systems, security systems, and wheelchair accessibility. *Id.*, J.A. at 31. The cost of building Section 8 apartments was further increased by the requirement to pay Davis-Bacon Act wages. HUD's onerous operating and reporting requirements increased the operating costs of Section 8 apartments. *Id.* Plaintiffs established in the summary judgment proceeding by unopposed

affidavit that for these and other reasons, on most occasions there were no closely comparable apartments in the unassisted market. *Id.*, J.A. at 30-32.

Because the negotiated initial rents were subject to a "rent reasonableness" constraint, as part of the process of negotiating the initial rent, HUD attempted to determine what the market rental for each proposed unit would be. 24 C.F.R. § 880.204(b)(1)(ii); HUD Handbook § 9-3d(2). HUD identified the most closely comparable (or least dissimilar) apartments that actually existed in the market. HUD recognized, however, that because of the lack of fully comparable units it would be necessary to make adjustments for:

> all significant differences between each comparable unit and the subject unit, taking into consideration such things as location, age, condition, size of units (overall square feet), number and furnishability of rooms, equipment, amenities, utilities, and services included in the rent, quality, management and maintenance services and all other significant differences.[10]

After all these adjustments were made, HUD employees performing the rent reasonableness study were authorized to make an additional 10 percent adjustment to compensate for increased security services and the higher costs of owning and maintaining assisted family and elderly/handicapped units. HUD Handbook § 9-3i. Once an employee making the initial determination reached what HUD described as a "subjective judgment" about what constitutes a "reasonable" initial rent for the assisted unit, *id.* § 9-3m, Housing Division Directors and Chief Appraisers were authorized to amend the employee's finding when they believed the employee's finding had been "more conservative than the circumstances and data warrant." *Id.* § 9-3n(6).

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[10] HUD Handbook § 9-3d(2).

These calculations gave rise to HUD's determination of a "reasonable" rent for the proposed Section 8 unit. Plaintiffs established by unopposed affidavit that this number was usually significantly higher than the market rent for the most comparable existing units used as the starting point of the process. Chaussee Aff. ¶ 11, J.A. at 32-33.

During the years at issue, HUD had no regulations governing what HUD calls "comparability studies." Not surprisingly, different HUD field offices performed them in significantly different ways. *Id.* ¶ 12, J.A. at 34-35. HUD's description of the general outlines of the process, however, shows that "comparability studies" were basically similar to the highly subjective and imprecise rent reasonableness studies just described. Declaration of James J. Tahash (Nov. 13, 1990) ¶¶ 5-6, J.A. at 48.

There is, however, a crucial difference between the significance of a rent reasonableness study and a "comparability study." If HUD failed to establish for a proposed Section 8 project a contract rent the developer considered appropriate, the developer was free to reject HUD's offer and avoid spending millions of dollars to build and operate the project. Once a HAP Contract is in place, however, giving HUD the power to make subjective and unilateral rent adjustments leaves the owner, who performed under the contract, completely at HUD's mercy.

B. "Comparability Studies" Were Carried Out So Arbitrarily They Do Not Measure Anything

The inherently subjective nature of the "comparability" process is compounded by the absence of detailed, well-reasoned guidelines. As the District Court in *Rainier View* found, HUD had no "uniform guidelines to be applied on a consistent, nationwide basis" in carrying out "comparability studies." *Rainier View Associates v. United States* (W.D. Wash.), Order Jan. 15, 1986, *reproduced in United States v. Rainier View Associates*, Petition for a Writ of *Certiorari* at 16a, 30a (1988). As a result, comparability decisions lay within the

"totally unfettered discretion of the personnel in the particular field office." *Id.* Comparability decisions were made without any "consistent system or methodology." *Id.* These defects were so egregious that the District Court in *Rainier View* held that HUD violated procedural due process in performing its "comparability studies." *Id.* at 33a.

In 1987, Congress rebuked HUD for making "capricious individualized rent reductions . . . on an ad hoc and arbitrary basis in the absence of published procedures." H.R. Rep. No. 122, 100th Cong., 1st Sess. 32 (1987). In 1989, the staff of the Senate Banking, Housing and Urban Affairs Committee condemned the "serious procedural deficiencies" in HUD's application of comparability, by which "[o]wners were harmed." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). In the Ninth Circuit, HUD candidly admitted that "in Congress' view, [HUD] maladministered the comparability process." Brief for Appellants in *Alpine Ridge v. Kemp* and *Acacia Villa v. Kemp*, Nos. 91-35267, 91-55354 ("HUD Ninth Circuit Brief") at 45. Under these circumstances, there is no reason to believe the "comparability studies" are an accurate measure of anything, and certainly not of the rent adjustments to which owners are entitled under their HAP Contracts.

IV. THE COURTS HAVE REBUFFED HUD'S ATTEMPT TO REPUDIATE ITS OBLIGATIONS

In *Rainier View Associates v. United States*, 848 F.2d 988, 991 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the Court of Appeals for the Ninth Circuit recognized that the HAP Contracts, like the underlying Section 8 statute, require adjustments that "keep assisted rents in line with market rents." The Ninth Circuit, however, rejected HUD's contention that the overall limitation provision authorizes HUD to abandon the formula method of rent adjustment it elected in the HAP Contracts and adjust rents instead on a subjective, case-by-case, market survey basis. *Id.* Applying the principle that all

provisions of a contract should be harmonized and given effect, the Ninth Circuit held that "[t]he overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey [*i.e.*, a "comparability study"]." *Id.* The limitation provision, the Ninth Circuit held, "authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another." *Id.*

Rainier View in no way denied HUD's right to verify whether application of the AAAF produces in a given submarket rents that are materially higher or lower than those of fully comparable unassisted units. Nor did *Rainier View* deny HUD's discretion as to how to determine whether an adjustment falls in the proper range. Under the Ninth Circuit's analysis, HUD could rely on "comparability studies" as a way of satisfying itself that the AAAF adjustments fall into the proper range. *Rainier View* held, however, that when a "comparability study" or something else indicates to HUD that in a particular local market use of the AAAF for the larger market area is producing adjustments that are inappropriately high or low, HUD is required by the HAP Contract to publish an AAAF for the submarket which will "keep assisted rents in line with market rents," *id.* at 991, and may not directly set rents on the basis of the "comparability study."

This is not a mere quibble over technicalities. HUD admits that AAAFs must "satisfy standard statistical criteria for reliability." *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937* (1990) at 3-4, lodged by HUD with the Court. A number which masqueraded as an AAAF, but rested on an *ad hoc* "comparability study" that extrapolates from the rent for three

to five unassisted apartments, does not come close to satisfying standard statistical criteria for reliability. Failure to recognize the substantial difference between easily manipulated, subjective "comparability studies" and statistically reliable indices of inflation underlies HUD's claim that the owners are complaining about minor procedural defects rather than about anything of substance. *See* HUD Brief at 34.[11]

Shortly after this Court refused to review the Ninth Circuit's *Rainier View* decision, HUD notified all owners of Section 8 apartments located in the Ninth Circuit that it would apply the *Rainier View* decision to them without need for them to bring suit. Goldrich Decl. ¶ 16, J.A. at 40-41. Nonetheless, several months later HUD requested Congress to overrule the Ninth Circuit's decision. 135 Cong. Rec. H9685 (daily ed. Nov. 21, 1989). Congress acceded to HUD's request in part by enacting Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057.

Section 801 provides that retroactive rent adjustments shall be made by applying the published AAAF not to the full Contract Rent but to the Contract Rent reduced by the amount of Contract Rent attributable to debt service, with the proviso that in no case are the adjustments to be less than 30 percent of the adjustment that would result from applying the AAAF to the full Contract Rent. Retroactively, therefore, the effect of Section 801 is to reduce the amount of the payments owners will receive by reducing the base to which the AAAF is applied.[12]

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[11] The Claims Court's failure to understand this point is a major flaw in its opinion. *See National Leased Housing Association v. United States*, 22 Cl. Ct. 649, 662 (1991) (Claims Court states that the issue is whether HUD could use results of comparability studies directly to set rent or was obliged to translate results of comparability studies into modified AAAFs).

[12] Amicus AFL/CIO suggests that calculation of past adjustments by applying the AAAF to the Contract Rent minus the amount required for debt

As regards future rent adjustments, in direct contradiction to the HAP Contracts as interpreted in *Rainier View*, Section 801 permits HUD to use "an alternative methodology," including what HUD calls "comparability studies," as an independent method of rent adjustment, whenever the Secretary determines that establishing an AAAF for smaller sub-markets will not eliminate rent disparities.

Two groups of owners of Section 8 Housing challenged Section 801 in the Western District of Washington and in the Central District of California. Both district courts found Section 801 unconstitutional because it deprives the owners of vested contract rights without due process of law. *Alpine Ridge v. Kemp*, 764 F. Supp. 1393 (W.D. Wash. 1990), *aff'd*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 15a; *Acacia Villa v. Kemp*, 774 F. Supp. 1240 (C.D. Cal. 1990), *aff'd*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 40a. The Ninth Circuit consolidated the two cases and affirmed in a unanimous opinion. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 1a. This Court granted *certiorari*.

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service is appropriate because the amount of debt service does not increase with inflation. This betrays a lack of understanding of what the AAAF is. The AAAF is not an index of changes in operating costs but rather an index of changes in rent levels. Applying an index of changes in rents to only that portion of the rent which is not required for debt service deprives owners of a significant portion of the adjustment to which they are entitled under the HAP Contracts and in simple justice. This can be clarified with an example. Suppose that a factory worker's union contract calls for a base wage of $15.00 a hour to be increased each year by the increase in the Consumer Price Index during the previous 12 months. In a 12 month period, the Consumer Price Index increases by 10%, but all of the increase is due to increases in the energy component of the Consumer Price Index. Although expenditures for energy constitute only 1/5th of the average worker's total expenditures, workers under the contract are entitled to a raise of $1.50 an hour ($15.00 x 10%), not to a raise of $.30 an hour (the $3.00 portion of the $15.00 wage spent for energy x 10%).

SUMMARY OF ARGUMENT

This case involves a constitutional challenge to an Act of Congress that abrogates key provisions of Housing Assistance Payments Contracts ("HAP Contracts") between HUD and the owners of low and moderate income housing units. The HAP Contracts implement a housing assistance program Congress created in 1974 by adding Section 8 to the United States Housing Act of 1937, 42 U.S.C. § 1437f. Under the Section 8 program, HUD pays the owners the difference between the rent paid by tenants and a Contract Rent negotiated by the parties and incorporated into the HAP Contract. The statute provides that the Contract Rent shall be adjusted annually based either on "changes in fair market rentals" or a "reasonable formula." 42 U.S.C. § 1437f(c)(2)(A) (1976). The statute also provides that such adjustments in the Contract Rent "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. §1437f(c)(2)(C) (1976).

HUD elected in the HAP Contracts to use the reasonable formula method authorized by statute for adjusting rents. Under this method, rent adjustments are made in accordance with a published Automatic Annual Adjustment Factor ("AAAF") developed by HUD's Office of Economic Affairs using data derived from the Consumer Price Index and the American Housing Survey conducted by the Bureau of the Census. The HAP Contracts contain an "overall limitation" clause providing that adjustments shall not result in material differences between the rents charged for assisted and comparable unassisted units except to the extent such differences may have existed with respect to the initial Contract Rent. HAP Contract §1.9(d). In a prior decision, *Rainier View Associates v. United States*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the Ninth Circuit held that the "overall limitation" provision permits HUD to adjust the AAAF when necessary to avoid rent

differentials, but "does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey." 848 F.2d. at 991.

Following the *Rainier View* decision, Congress enacted Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, as an amendment to Section 8 of the United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888. Section 801 abrogates the provisions of the HAP Contracts by: (1) allowing HUD to make rent adjustments retroactively by applying the published AAAF not to the full Contract Rent, but to the Contract Rent reduced by the amount of the Contract Rent attributable to debt service, with the proviso that in no case are the adjustments to be less than 30 percent of the adjustment that would result from applying the AAAF to the full Contract Rent, and (2) allowing HUD to base future rent adjustments on "comparability studies" whenever the Secretary determines that establishing an AAAF for sub-markets will not eliminate rent disparities. The government has estimated that Section 801 will save HUD in excess of one billion dollars in rent subsidies. The Ninth Circuit, in the case under review, held Section 801 unconstitutional because it deprives owners of vested contract rights without due process of law. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992).

1. In its brief, the government assails *Rainier View's* construction of the HAP Contracts, arguing that the overall limitation provision of the HAP Contracts authorizes HUD to adjust rents in any way it chooses whenever HUD unilaterally determines that rent adjustments for an individual Section 8 project based on the published AAAFs will lead to material differences between rents for assisted and comparable unassisted units. This interpretation of the limitation provision is not supported by its language or any of the established rules of contract construction.

It is clear from the plain language of the HAP Contracts that rents must be adjusted by applying the AAAF. The limitation clause does not mention any other method of rent adjustment. Rather, the limitation clause expressly applies to "adjustments under this section," *i.e.*, adjustments calculated by applying the AAAF. The fact that the limitation applies "notwithstanding any other provision of this Contract" only resolves inescapable conflicts between the limitation and other contract provisions. The limitation provision can be readily harmonized with the "reasonable formula" elected by HUD in the HAP Contracts by modifying the AAAF to eliminate any disparities in particular sub-markets, which is what HUD did between 1974 and the early 1980s. What cannot be harmonized are the contract provisions for adjustments based on a published, objective and statisically reliable formula and HUD's attempt to make adjustments based on *ad hoc* market surveys HUD calls "comparability studies."

The intent of the parties becomes unmistakably clear when the HAP Contracts are read against the background of the statute, the implementing regulations, HUD Handbook provisions, and the parties' course of dealing. The limitation clause in the statute does not prescribe a method of rent adjustment but rather simply imposes a limit on the amount of the adjustments "hereinbefore provided." The adjustments "hereinbefore provided" are to be based on "changes in fair market rentals" or on "a reasonable formula." The statute thus confirms that adjustments are to be made by one of the two statutory methods and not by any method HUD believes will achieve a desired result.

HUD chose to write contracts that call for rent adjustments on the basis of the AAAF. The HUD regulations in force at the time the contracts were being negotiated and contemporaneous HUD handbooks published for the guidance of program participants expressly stated that HUD would insure comparability

by publishing AAAFs for local markets where use of the AAAF for a larger market would lead to material differences. In presentations, HUD sold the Section 8 program to developers as a program in which rents would be automatically adjusted on the basis of published objective measures of inflation, not on the basis of subjective case-by-case judgments. The record shows that the owners decided to participate in the program only because it included automatic rent adjustments. For at least seven years, HUD gave evidence of its own understanding of the HAP Contracts by implementing the comparability limitation through publication of AAAFs for smaller sub-markets where this was necessary. Nothing in the language of the HAP Contracts, the parties' course of dealing, or any rule of contract interpretation contradicts *Rainier View*'s holding that rent adjustments based on "comparability studies" violate the HAP Contracts.

2. As HUD admitted in the courts below, Section 801 substantially impairs the owners' rights. Retroactively, it reduces the amount of the rent to which they are entitled by reducing (in many cases by as much as 70 percent) the base to which the AAAF is applied in calculating rent adjustments. Prospectively, it abrogates a central term of the HAP Contracts by permitting HUD to pay the lower rents it determines on an *ad hoc* case-by-case basis rather than the rents determined by applying an AAAF that properly reflects inflation in the local market.

Contract rights for which owners have provided independent consideration by building and operating Section 8 projects are property rights protected by the Fifth Amendment. As HUD admits, saving money is not sufficient constitutional justification for abrogating the rights of private parties under contracts with the United States for which the private parties have provided independent consideration.[13] The measures

[13] *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986); *Perry v. United States*, 294 U.S. 330 (1935);

Congress took in Section 801 are designed simply to save money by reducing the payments to which Section 8 owners are entitled. The legislative history strongly confirms that in Section 801 Congress had only one thing in view: saving money. As legislation that abrogates rights under federal contracts merely to save money, Section 801 is invalid.

Nothing in the text of Section 801 or in its legislative history provides any support for HUD's contention that Section 801 was enacted to restore uniformity to a national program. Moreover, even if there were some support for HUD's contention that Section 801 was enacted to restore uniformity, that goal would not be sufficient justification since it is simply a polite way of saying that Section 801 is justified by HUD's desire not to obey *Rainier View*. No government contract would be worth the paper it is written on if, after violating the contract and losing in court, the government could justify legislation overturning the court's decision on grounds that the decision destroyed uniformity in the administration of the contract.

Section 801's abrogation of the owners' rights cannot be justified on the ground that those rights were always subject to legislative defeasance under *Bowen v. Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41 (1986). Unlike the situation in *POSSE*, the rights here at issue are central terms of a contract with a private party for which the owners provided independent consideration. The HAP Contracts, far from simply mirroring the underlying legislative scheme as did the agreement in *POSSE*, specified that owners are entitled to rent adjusted by applying the AAAF. Furthermore, Section 801, unlike the legislation in *POSSE*, is not an exercise of the police power or any other paramount power of Government to provide better housing for poor families. On the contrary, Section 801

Lynch v. United States, 292 U.S. 571 (1934); *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

harms poor families by depriving owners of the money needed to maintain Section 8 apartments properly and to provide adequate security measures.

Section 801 cannot be justified as curative legislation. The curative legislation cases merely uphold statutes against constitutional challenges on grounds of impermissible retroactivity. Section 801 would be unconstitutional even if its effects were only prospective. The purported curative character of legislation does not justify abrogation of vested rights under a contract with the federal government for which a private party has provided independent consideration.

ARGUMENT

I. UNDER THE HAP CONTRACTS OWNERS ARE ENTITLED TO RENT ADJUSTMENTS DETERMINED BY APPLYING A PUBLISHED AUTOMATIC ADJUSTMENT FACTOR

In interpreting these government contracts, as in interpreting contracts between private parties, the primary function of the courts is to discern and give effect to the parties' intention. *See, e.g., SCM Corporation v. United States*, 675 F.2d 280, 283 (Ct. Cl. 1982); *Steve Altman Photography v. United States*, 18 Cl. Ct. 267, 275 (1989). Even read in isolation, the contract language supports the Ninth Circuit's interpretation of the parties' intent. That intent becomes unmistakably clear when the HAP Contract is read against the background of the statute, the implementing regulations, HUD Handbook provisions, HUD's election of the automatic formula method of rent adjustment, and the parties' course of dealing.

A. The Plain Language Supports The Ninth Circuit's Interpretation Of The HAP Contracts

Section 1.9 of the HAP Contracts typically contains the following provisions:

> b. Automatic Annual Adjustments
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.
>
> ***
>
> d. Overall Limitation. Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government, provided that this limitation shall not be construed to prohibit differences in rents between assisted and unassisted units to the extent that such differences may have existed with respect to the initial Contract Rent.

There is no dispute that Section 1.9(b)(2) of the HAP Contracts expressly requires the AAAF method of adjusting rents: "the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor." HUD contends, however, that if a "comparability study" indicates that application of the AAAF would lead to material differences in any particular sub-market, the overall limitation provision by implication absolves HUD from its contractual obligation to adjust rents by applying an automatic adjustment factor and

allows HUD to adjust rents *in any way it chooses*. HUD Brief at 26.

HUD stresses over and over again that the limitation provision applies "notwithstanding any other provisions of this Contract," as if that settled the issue in HUD's favor. What deserves equal emphasis, however, is that the "notwithstanding" clause by its terms only limits the rent adjustments which would otherwise result from the AAAFs. It does not by its terms permit HUD to substitute for the published, statistically-reliable formula method required by the HAP Contracts whatever other method HUD or one of its field offices subjectively determines on an *ad hoc* basic will produce a desired result.

HUD itself admits that Section 1.9(d) does not expressly address the question of how rents are to be adjusted if application of the unmodified AAAF would lead to material differences. HUD Brief at 19 n.17. By its terms Section 1.9(d) limits the size of the adjustments "provided in this Section." The reference to adjustments "provided in this Section" indicates that Section 1.9(d) is intended to limit the size of adjustments made by applying the AAAF methodology set forth in Section 1.9(b)(2).

HUD's reading of the limitation provision must be rejected for two additional reasons. First, the uncontested record in this case establishes that the automatic adjustment provision was a central provision of the HAP Contracts and that the owners would not have signed contracts that expressly contained the provision HUD asks the Court to imply. *See supra* p. 4. Second, HUD's reading of the HAP Contracts flies in the face of the fundamental principle of contract interpretation that all contract provisions are interpreted to the extent possible to harmonize with and give effect to other provisions of the contract, particularly other provisions that are central to the deal struck by the parties.[14]

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[14] *Muniz v. United States*, 972 F.2d 1304, 1320 (Fed. Cir. 1992) ("A cardinal rule of contract interpretation requires that an interpretation which

The mere fact that Section 1.9(d) is to be applied "notwithstanding any other provisions of this Contract," does not absolve the Court from giving effect to all provisions of the Contract, including Section 1.9(b)(2), which expressly requires use of automatic adjustment factors. The effect of the "notwithstanding" language is to indicate that Section 1.9(d) prevails over any other contract provision *with which it cannot be harmonized*. It was not intended to serve as a pretext for totally abandoning a formula method with which it can be readily harmonized and which is fundamental to the parties' agreement.[15]

In the summary judgment proceedings, HUD presented no evidence that it cannot produce accurate AAAFs for the markets or sub-markets in which Section 8 apartments are located.[16] Nor

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gives meaning to all parts of the contract will be preferred to one which leaves a portion of it useless, inoperative, meaningless or superfluous."); *Industrial Indemnity Co. v. United States*, 14 Cl. Ct. 351 (1988) ("The Court must give a reasonable meaning to all parts of the instrument, rather than leaving a portion of it useless."); *see Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 392 (1916); 4 *Williston On Contracts* § 619 at 731 (3d ed. 1961).

[15] *See, e.g., McCain v. Cox*, 531 F. Supp. 771, 781 (N.D. Miss. 1982), *aff'd*, 692 F.2d 755 (5th Cir. 1983). In *McCain*, a party to a land contract attempted to avoid its obligations under the contract based on a contingency clause that was effective "[a]nything herein to the contrary notwithstanding." *Id.* The court reasoned that despite the all-encompassing language of the contingency clause, "[c]ontracts must be construed as a whole and effect given to all provisions unless such construction produces unfair or unreasonable results." *Id.* Thus, the court construed the contingency clause in a manner that gave effect to both the contingency clause, as well as all other contract clauses.

[16] Although HUD has made self-serving representations to Congress that producing accurate AAAFs would not be "cost effective" in some cases, *Report to Congress on the Adjustment of Contract Rents under Section 8(c)(2)(C) of the United States Housing Act of 1937* at 1 (lodged by HUD with the Court), HUD estimates that it can produce an accurate AAAF for a metropolitan area for $20,000. *Id.* at 5. In the context of a multi-billion dollar

has HUD asserted that application to the negotiated initial rent of a formula which accurately reflects inflation in the sub-market in which the assisted property is located would lead to material differences between rents of assisted and unassisted units. Any claim that increasing the initial negotiated rent by an accurate inflation factor leads to material differences must rest on the assumption that the Contract Rent rent HUD negotiated was too high and therefore the Contract Rent should increase at less than the market rate of inflation. Such a policy finds no support in the "overall limitation" which expressly permits "differences in rents between assisted and unassisted units to the extent that such differences may have existed with respect to the initial Contract Rent."

If there were any ambiguity as to the meaning of the overall limitation, that ambiguity would have to be resolved against HUD. In choosing among the reasonable meanings of a contract provision, "the provision should be construed less favorably to that party which selected the contractual language." *United States v. Seckinger*, 397 U.S. 203, 216 (1970). This principle applies with special force to the United States "because of the Government's vast economic resources and stronger bargaining position in contract negotiations." *Id; see Essex Electro Engineers, Inc. v. United States*, 22 Cl. Ct. 757, 763 (1991), *aff'd*, 960 F.2d 1576, *cert. denied*, 113 S. Ct. 408 (1992); *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).

HUD's contract arguments do not distinguish or even cite any established rules of contract construction. In fact, HUD turns these rules on their head by contending that the courts should give deference to HUD's interpretation of its own contractual obligations. As the cases cited above demonstrate, the

program, these are not the sort of numbers that would support a claim of impossibility of fulfilling the obligation to produce and apply accurate AAAFs.

central principle in all contract interpretation is to ascertain the intent of the parties, and the rules for discerning that intent are as applicable to contracts with the government as to contracts between private parties.

B. HUD's Election Of Automatic Adjustments Precludes Case-By-Case Adjustments Based On "Comparability Studies"

The statute authorizes two methods of rent adjustment: "changes in fair market rentals" and a "reasonable formula." The differences between the procedure HUD elected in the HAP Contracts (the formula) and the one it rejected (fair market rentals) are crucial.

"Comparability studies" and fair market rentals both fit into the genus described by the *Rainier View* court as "market surveys." *Rainier View*, 848 F.2d at 991. Both fair market rent calculations and "comparability studies" are carried out by local HUD field offices. HUD Handbook ¶ 8-2(a). The procedures used in developing fair market rentals, like those used in "comparability studies," involve numerous subjective judgments by employees of HUD's field offices.[17] Both "comparability

[17] In developing fair market rentals, the valuation section of the HUD field office must identify what constitutes "dwelling units of modest design, suitable for the market and climate of the market area." HUD Handbook § 8-3a(3). HUD Field Offices are warned to avoid both "too restrictive an interpretation of modest design" and "too liberal an interpretation." *Id.* § 3a(3). In compiling its sample of market rent comparables, the Field Office has wide discretion in deciding what units are "representative of newly constructed units of modest design." *Id.* § 8-3b. The mix of neighborhoods represented in the sample will have great influence on the level of fair market rentals. Once comparables are chosen, further subjective adjustments are made to account for the differences between a hypothetical standard unit and each unit chosen as part of the sample of comparable units. *Id.* § 8-3b(2). After preparing a schedule of "comparable" adjusted rentals, the Field Office is instructed to identify those rentals that "appear reasonable" and are "well supported by relevant market data" and to adjust all other rentals as may be necessary by interpolation. *Id.* § 8-3d(3).

studies," and fair market rentals are estimates in dollars of the appropriate rents for various types of modest housing. Fair market rentals and "comparability studies" are, thus, two closely related varieties of market surveys. The principal differences between them is that fair market rentals are based on twelve to fifteen apartments (rather than three to five) and typically reflect data from a broader geographic area than "comparability studies".

If in drafting the HAP Contracts HUD had chosen to rely on changes in fair market rentals as the methodology for adjusting rents, and the developers had agreed to participate in the Section 8 program on that basis, HUD could have argued that rent adjustments were allowed on the basis of reasonably formulated and properly implemented "comparability studies" without violating its contractual commitments. HUD's justification for use of "comparability studies" in that case would not be, as it is here, that the overall limitation provision gives HUD the right to abandon the method of rent adjustment it chose in the contract and adopt another totally different method. Rather, if HUD had chosen the fair market rental method of rent adjustments, "comparability studies" could be viewed as a species of the method selected in the HAP Contract. Direct rent adjustments based on such "comparability studies" would be a refinement of the fair market rental methodology, not an abandonment.

AAAFs, however, in contrast to both fair market rental determinations and "comparability studies," are not based on data collected by HUD field offices, but on the Consumer Price Index and the American Housing Survey. Subjective *ad hoc* judgments by local employees play no part in the computation of AAAFs. AAAFs are not determinations of absolute dollar levels of rent, but rather percentages of average rent change. They are not a species of "market survey" but rather belong to the genus of formula-based adjustment processes. "Comparability studies" are, therefore, in no sense a refinement of the Automatic Annual Adjustment Factor method HUD elected. As the Ninth Circuit held in *Rainier View*, use of "comparability studies" as an independent method of rent adjustment constitutes a repudiation of the method HUD elected and incorporated into the contracts. *Rainier View*, 848 F.2d at 991.

HUD attempts to obfuscate the issue by arguing that there are some differences between "comparability studies" and the procedures used in establishing fair market rentals. HUD Brief at 25-26. Certainly there are some differences. The Ninth Circuit did not, however, hold that by using "comparability studies" as an independent method of rent adjustment HUD was using the fair market rental method. Rather it held that use of "comparability studies" as an independent method of rent adjustment, although compatible with a fair market rental methodology, is incompatible with the formula method HUD actually chose. *Rainier View*, 848 F.2d at 991.

C. The Statutory Background Confirms That Rents Must Be Adjusted Automatically

If the Court finds any ambiguity in the contract language, the Court's effort to discern the intent of the parties should take into account the legislative scheme that authorized the contracts as those statutes were interpreted at the time.

Rent adjustments based on widely-applicable published information rather than case-by-case *ad hoc* adjustments are a central feature of the Section 8 program. *See supra* pp. 2-5. The authorized mechanisms for ordinary rent adjustments are set forth in subsection (c)(2) of Section 8:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of

dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

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(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.[18]

There is no dispute that subsection (c)(2)(A) provides two alternative methods of calculating ordinary rent adjustments: "changes in the fair market rentals" or "a reasonable formula." Subsection (c)(2)(A) makes no mention of "comparability studies" or of any other third methodology for making rent adjustments.

Subsection (c)(2)(C) addresses the amount of the adjustments. They are to be set at such a level that rents for assisted units will not be materially different from those for comparable unassisted units. HUD admits that the statute does not prescribe the methodology for achieving that result. HUD Brief at 20, 22; *see* HUD Ninth Circuit Brief at 21, 30. Nothing in the text or legislative history of subsection (c)(2)(C) suggests that it was intended to authorize a third methodology for making ordinary rent adjustments. On the contrary, subsection (c)(2)(C) explicitly refers to "adjustments in the maximum rents *as hereinbefore provided*," *i.e.*, adjustments as provided in subsection (c)(2)(A) (emphasis added). The reference at the end of subsection (c)(2)(C) to determinations by the Secretary gives the Secretary discretion to choose the method for determining whether the adjustments made under subsection (c)(2)(A) produce the appropriate level of rentals. It does not authorize the Secretary to adopt a method of making ordinary rent adjustments other than one of the two methods set forth in subsection (c)(2)(A).

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[18] 42 U.S.C. § 1437f(c)(2)(A), (C) (1976). Special "additional adjustments," not at issue in this proceeding, are provided for in subsection (c)(2)(B) of Section 8. 42 U.S.C. § 1437f(c)(2)(B) (1976).

D. HUD'S Regulations And Handbooks And Its Administration Of The HAP Contracts Confirm The Ninth Circuit's Interpretation

The HUD regulations in force at the time the HAP Contracts were signed reflect HUD's contemporaneous understanding both of the underlying statutory scheme and of the HAP Contracts. In addition, the regulations in force at the time the HAP Contracts were signed are an important guide to the owners' understanding of the contracts since the owners looked to the regulations for guidance in understanding the contract provisions and HUD's plans for implementing them. Finally, HUD's regulations and handbook provisions and its actual administration of the HAP Contracts during the first seven years constitute a "course of dealing" which reflects the parties' understanding of their agreement.[19]

The regulations in effect at the time the HAP Contracts were signed, and still in effect today, explicitly provide:

> The adjusted monthly amount of the Contract Rent of a dwelling unit *shall be determined* by multiplying the Contract Rent in effect on the anniversary date of the contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount.[20]

Until after these lawsuits were filed, there was no suggestion anywhere in the regulations that HUD considered it had authority under the statute or under the contracts to use any method of rent adjustment other than the Automatic Annual

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[19] The parties' course of dealing in performing a contract is "often the strongest evidence of . . . [its] meaning." *Restatement (Second) of Contracts* § 202g (1981).

[20] 24 C.F.R. § 888.203(b) (1992); 41 Fed. Reg. 49,440 (1976) (emphasis added).

Adjustment Factor. The regulations simply 1) required that adjustments be made by applying the AAAF, 2) prohibited materially different rents, and 3) provided that where application of unmodified factors would produce materially different rents, HUD would modify the factor.[21] These regulations were implemented in HUD Handbook provisions that required HUD to prepare modified factors whenever the rents produced by applying unmodified factors would be materially different from those for comparable unassisted units. *See supra* pp. 5-6.

For at least the first seven years of the Section 8 program, it is undisputed that HUD made rent adjustments by applying the AAAF factor and not by "comparability studies". Until at least 1981, no one had any reason to believe that HUD interpreted the statute or the HAP Contracts as permitting it to adjust rents by any method other than by applying the AAAFs, modified as necessary to prevent material differences in particular sub-markets. HUD obviously has altered its interpretation or this dispute would not exist. The relevant interpretation for purposes of discerning the intent of the parties is, however, the interpretation HUD gave at the time the contracts were signed, not the interpretation it invented years later. "In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made." *Restatement (Second) of Contracts* § 202 cmt. b (1981).

In light of HUD's election of the Automatic Annual Adjustment Factor, HUD's marketing of the program as one in-

[21] Although HUD has been doing "comparability studies" for more than a decade, the first regulations that provide for the use of "comparability studies" were published in proposed form on October 29, 1992. 57 Fed. Reg. 49,120 (1992). HUD claims that 24 C.F.R. § 880.609(c) supports its position. HUD Brief at 27-28. That regulation, however, merely reiterates that Section 8 rents shall not exceed those for comparable unassisted units. It does not mention "comparability studies," much less discuss their use as an independent method for making rent adjustments on a case-by-case basis.

volving automatic adjustments, and HUD's regulations and handbooks which declared that HUD would prepare factors for smaller markets where necessary and made no mention of "comparability studies," the owners neither knew nor had reason to know that HUD believed that the contracts permitted rent adjustments through "comparability studies." By contrast, HUD had ample reason to know that the owners expected automatic, not case-by-case, adjustments. Under such circumstances, any ambiguity in the contract must be resolved in accordance with the meaning attached to it by the owners, not HUD. *Restatement (Second) of Contracts* § 201(2) (1981).

II. SECTION 801 VIOLATES THE FIFTH AMENDMENT BY DEPRIVING OWNERS OF THEIR VESTED RIGHTS UNDER CONTRACTS WITH THE UNITED STATES

Section 801 purports to allow HUD to make future rent adjustments through "comparability studies" and to limit past rent adjustments to an amount determined by applying the AAAF not, as the HAP Contracts specify to the entire Contract Rent, but rather to the Contract Rent minus the amount required for debt service. The government estimates that the changes made by Section 801 will save HUD in excess of $1 billion by forcing owners to absorb costs HUD otherwise would have had to bear under *Rainier View's* interpretation of the HAP Contracts.

This the United States may not do. As this Court held more than a century ago:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality.

Union Pacific Railroad Co. v. United States (*Sinking-Fund Cases*), 99 U.S. 700, 719 (1879).

> Judge Learned Hand elaborated on this principle:
>
> [I]n the performance of [the government's] voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men.

Heil v. United States, 273 F. 729, 731 (8th Cir. 1921).

A. The Owners' Rights Under The HAP Contracts Are Property Protected By The Fifth Amendment

1. The Owners' Rights Under The HAP Contracts Are Not Subject To Defeasance

HUD does not dispute that the HAP Contracts are valid and that the owners have performed. HUD, nonetheless, contends that the owners' rights are subject to defeasance by legislation. HUD Brief at 32-33. HUD's contention rests on the startling proposition that the provision by a private party of goods and services under a written contract with the United States creates no indefeasable right to payment of the contract amount unless the United States surrenders in unmistakable terms its power to enact legislation declaring that it will not pay the contract amount. *Id.*

In fact, the United States did surrender in unmistakable terms its power to abrogate the HAP agreements. 42 U.S.C. § 1437c (1976) provides: "The faith of the United States is solemnly pledged to the payment of all annual contributions

contracted for pursuant to this section." The HAP Contracts implement that statutory provision: "The Faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to this Contract." Contract between HUD and Antelope Valley ¶ 1.3(a), Exhibit 2c to Goldrich Decl. The solemn pledge of the faith of the United States to the fulfillment of a contract is surely an unmistakable pledge that Congress will not abrogate central provisions of the contract by legislation.

The case on which HUD relies, *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), does not support the proposition that the government is free to pay whatever it wishes - or nothing at all - for goods and services (whether they be Air Force jets, computers, highways, or cleaning services in federal buildings) unless the contract explicitly states that the government will not legislatively alter its obligations.

POSSE involved an agreement between the federal government and the State of California, not a contract with a private party to which the faith of the United States is solemnly pledged. The agreement regarded coverage of state employees by Social Security, not the provision of goods and services to the government. This Court expressly noted that *POSSE* did not involve "an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." 477 U.S. at 55.[22]

This Court stressed that the agreement in *POSSE* "simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." *Id.* It "exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself." *Id.* The agreement provided that its terms were

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[22] In contrast, the HAP Contracts are with private parties for the provision of goods and services, and the private parties provided consideration by building and operating low income housing.

"in conformity with the underlying statutory provision." 477 U.S. at 54. "[T]he Agreement expressly incorporated § 418, which of course was fully subject to Congress' reserved power of amendment." *Id.* In the statute, the United States expressly reserved a right to "alter, amend or repeal" the act at any time. 477 U.S. at 52 (*citing* 42 U.S.C. § 1304). The language of reservation "expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself." 477 U.S. at 54.[23]

Because of these characteristics of the agreement at issue in *POSSE* this Court held that " the 'contractual right' at issue in [*POSSE*] bears little, if any, resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment." 477 U.S. at 55. Under the HAP Contracts the owners enjoy exactly what the *POSSE* court was careful to distinguish: a right under a contract for which consideration has been provided.

Furthermore, the legislative impairment of the agreements in *POSSE* was an incidental effect of Congress' regulatory efforts to shape social policy by making participation in the Social Security program mandatory for certain State employees. Congress did this, among other reasons, because it believed that mandatory participation was necessary to protect workers who moved from job to job and to safeguard the integrity of a major social program. *Id.* Such protection of the health, safety and welfare of American citizens where vested contract rights are not at stake is undeniably an exercise of the government's legitimate police powers.

Despite HUD's attempt to characterize Section 801 as an attempt to "reform 'a comprehensive social welfare program

[23] The HAP Contracts, far from alerting owners that the contract might be changed by amending the statute, solemnly pledged the faith of the United States to the fulfillment of HUD's obligations.

affecting millions of individuals,'" HUD Brief at 43 (*quoting POSSE*, 477 U.S. at 53), Section 801 does not reshape social or economic policy. Section 801 does not modify the services provided to low-income families or senior citizens, establish new program eligibility requirements, streamline federal procedures, or change in any other way the scope or nature of the housing program. Section 801 simply transfers to Section 8 owners a significant part of the cost of that program. Section 801 is no more a reform of housing policy than a bill declaring that Congress intends to pay only half the contract price for cleaning of prisons is a reform of penal policy. Thus, *POSSE* cannot help HUD here.[24]

What this Court has said about states and municipalities which issue debt obligations can be applied with equal force to the United States when it contracts for the provision of goods and services:

> [I]nstead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.[25]

For this reason, "[i]n almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." *See Energy Reserves Group, Inc.*

[24] The other cases which the government cites, *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), and *United States v. Sperry Corp.*, 493 U.S. 52 (1989), do not involve abrogation of rights under contracts with the government. They merely deal with the question of retroactivity and provide no support for the proposition that Congress retains the power to abrogate government contracts unless it explicitly renounces that power. *See infra* pp. 37-40.

[25] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 n.23 (1977) (*quoting Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

v. Kansas Power & Light Co., 459 U.S. 400, 412 n.14 (1983) (citations omitted). This principle applies with special force here because the government has solemnly pledged its faith to fulfillment of the HAP Contracts.

2. Vested Contract Rights Are Property Protected By The Fifth Amendment

"Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Specifically, a right to receive from the United States a benefit under a contract for which consideration has been provided is property for purposes of the Fifth Amendment. *POSSE*, 477 U.S. at 55.

B. Section 801 Substantially Infringes The Owners' Rights

HUD argues for the first time in this Court that Section 801 does not *substantially* impair the owners' contract rights and therefore is not unconstitutional. HUD Brief at 29-35. Like so much of HUD's argument, this assertion is based on the assumption that its "comparability studies" are an accurate measure of the rent due under the HAP Contracts. That assumption, as has been demonstrated, is false.[26] *See supra* pp. 7-11.

In the courts below, and even in its Petition for a Writ of *Certiorari*, HUD was far more candid. In *Alpine Ridge*, HUD did "not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights." *Alpine Ridge Group*, 764 F. Supp. at 1399, Pet. App. at 27a. In *Acacia Villa*, HUD conceded that owners would receive retrospectively only 30 percent of what they would have received if the AAAF had been applied to the

[26] HUD's assertion that "comparability studies" affect only a small minority of Section 8 projects also lacks any foundation in the record and contradicts the experience of the parties to this litigation.

entire existing contract rent each time an adjustment was made. *Acacia Villa*, 774 F. Supp. at 1244, Pet. App. at 43a. The *Acacia Villa* court found that Section 801 "locks the project owners into a base rent that is lower than what would have been the base rent had the AAAF been used all along. The use of the depressed base rent in calculating future rent adjustments means that those adjustments will necessarily be lower than they would otherwise have been." *Id.* at 1247, Pet. App. at 50a. In the Ninth Circuit, HUD did not challenge these findings as erroneous and did "not dispute that Section 801 substantially impairs the owners exercise of [their] property rights." *Alpine Ridge Group*, 955 F.2d at 1387, Pet. App. at 12a. In its Petition, HUD told this Court that the difference between the amount it would pay under Section 801 and the amount it would have to pay if this Court upheld the Ninth Circuit's decision "will exceed $1 billion." Pet. at 23. Whether or not $1 billion is a substantial amount for HUD, a loss of $1 billion is surely a substantial impairment of the owners' rights.

C. Legislation That Abrogates Vested Rights Under Contracts With The United States Cannot Be Justified As "Curative"

HUD claims that Section 801 is constitutional because it "cures" what Congress viewed as the Ninth Circuit's erroneous interpretation of the HAP Contracts. HUD Brief at 37-40. The breadth of HUD's claim is startling. It asserts that even on the supposition that owners actually had the vested contract rights the Ninth Circuit held they enjoyed (even, that is, on the supposition that this Court finds the Ninth Circuit correctly interpreted the HAP contracts), the Constitution permits Congress to abrogate owners' rights if Congress disagrees.[27]

[27] This is neither a caricature nor an exaggeration of HUD's position. Section I of HUD's brief argues that the owners did not have the contract rights the Ninth Circuit held they had. Section II, B, 1 argues that *even if this Court holds the owners had vested rights*, Section 801 is constitutional as "curative legislation."

Rainier View held that the statute and the HAP Contracts require that Section 8 rents not be materially different from those for comparable unassisted units. *Rainier View* explicitly stated that HUD is required to take corrective action (by preparing an appropriate AAAF for the local sub-market) "whenever application of the formula would result in a disparity between section 8 and other rents." *Rainier View*, 848 F.2d at 991.[28] *Rainier View* also recognized that the *statute permitted* HUD to write contracts that would have permitted rents to be set directly through "comparability studies." It merely held that the *contracts* HUD elected to enter into do not permit direct rent adjustments through "comparability studies." *Id.*

In enacting Section 801, Congress took two actions that gave rise to this controversy: (1) it reduced the amount of retroactive adjustments by requiring that the AAAF be applied, not to the full Contract Rent (as expressly required by the HAP Contracts), but rather to the Contract Rent reduced by the amount dedicated to debt service; and (2) in violation of the HAP Contracts, it authorized HUD to adjust rents directly on the basis of "comparability studies" in the future if, in the Secretary's view, it was not practical to publish AAAFs for certain submarkets.

The curative legislation cases HUD cites[29] have no relevance to the issues raised by Section 801. The only constitutional issue raised by the curative legislation cases is whether the retroactive character of the curative statute violates the Constitution. The effect of classification of a law as curative is

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[28] HUD concedes that "*Rainier View* acknowledged that adjustments were limited by comparable rents." HUD Brief at 7; *see* HUD Brief at 30.

[29] *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

merely to provide one more motive for concluding that the law may be applied retroactively without violating the Fifth Amendment. *Temple University v. United States*, 769 F.2d 126, 134 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

"Curative laws are subject to the same constitutional limitations which apply to other legislation." 2 *Sutherland Statutory Construction* § 41.12 (4th ed. 1986). The curative character of a law has no relevance to whether the law would violate the Constitution (as would Section 801) even if applied prospectively only. As the Ninth Circuit held, the curative legislation cases relied on by HUD simply do not address the constitutionality of abrogating "bargained for *contract* rights, supported by independent consideration." *Alpine Ridge*, 955 F.2d 1386, Pet. App. at 10a (emphasis in original). The purported "curative" aspect of Section 801 is irrelevant to the issue of whether Congress may save money by legislatively abrogating (retroactively and prospectively) vested rights under a government contract for the provision of goods and services.

HUD claims that the Ninth Circuit erred in distinguishing the curative legislation cases on grounds that they did not involve "vested rights." HUD Brief at 38. This is a serious misreading of the Ninth Circuit's opinion. The Ninth Circuit did not say that none of the curative legislation cases involved "vested rights." Rather, it held that they did not involve "bargained - for *contract* rights supported by independent consideration." *Alpine Ridge*, Pet. App. at 10a (emphasis in original).

HUD stresses that the curative legislation upheld by this Court in *Graham & Foster v. Goodcell* deprived taxpayers of "vested rights." *See* HUD Brief at 37-38. HUD concludes that as "curative legislation" Section 801 may constitutionally deprive Section 8 owners of their vested rights. *Id.* Apparently HUD reasons that if curative legislation can destroy one vested right, it can destroy any vested right. In *Graham & Foster v. Goodcell*, the IRS had allowed the statute of limitations to run

because it had misunderstood the law. Absent the government's misinterpretation of the law, the taxes would have been collected and the taxpayers would have had no complaint. This Court permitted retroactive legislation to defeat the taxpayer's "asserted vested right" to protection under the statute of limitations because it was not "linked to any substantial equity." 282 U.S. at 429. This reflected the fact that rights under a statute of limitations do not enjoy the same degree of protection as other rights.[30] Because the rights at issue here are "bargained-for *contract* rights, supported by independent consideration," *Alpine Ridge*, 955 F.2d at 1386, Pet. App. at 10a (emphasis in original), they do involve substantial equity and are entitled to much more protection than rights under a statute of limitations.

None of the cases HUD cites, nor any of the other decided cases involving curative legislation, suggest that Congress' desire to "cure" what it believes to be errors in a court's interpretation of a government contract permits Congress to abrogate vested rights to payment for goods and services under a contract with the federal government which the private party has performed.

D. Because It Abrogates Federal Contracts With Private Parties In Order To Save Money,Section 801 Violates Due Process

1. Legislation That Abrogates Federal Contracts To Save Money Violates Due Process

Congress has directly repudiated central provisions of the HAP Contracts to save money. On the rare occasions when Congress has attempted to do something like this in the past, the courts have not felt obliged to engage in any balancing analysis.

[30] *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *see Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1476, 1477 (10th Cir. 1984).

Direct repudiation of a federal contract to save money is so clearly and strikingly unconstitutional that the courts have flatly stated, without explicit balancing, that Congress lacks authority to engage in such an act.

In *Lynch v. United States*, 292 U.S. 571 (1934), this Court held unconstitutional a provision of the Economy Act which canceled insurance policies the United States had previously issued to veterans. The Court held that Congress was without power to destroy the plaintiffs' vested contractual rights, despite the government's argument that the economic exigencies of the Great Depression justified its action:

> No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.[31]

Likewise, in *Perry v. United States*, 294 U.S. 330, 350-51 (1935), this Court held that the United States could not legislatively repudiate its obligation to pay the principal and interest of certain bonds in gold coin of the standard of value existing at the time of issuance of the bonds:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers . . . . Con-

[31] 292 U.S. at 580.

> gress is authorized to pledge [the] credit [of the United States] as an assurance of payment as stipulated, as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government.[32]

In *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272 (1943), Congress had passed legislation which prohibited payment on a government contract. The court refused to allow the government to nullify its contract: "[A] contract with the United States cannot be nullified by the United States unless it falls within the Federal police power or some other paramount power. No other power is claimed." 99 Ct. Cl. at 315.

In *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977), the D.C. Circuit held unconstitutional a congressional attempt to deny reenlistment bonuses to which Navy enlisted men were entitled under a formula in effect at the time of their reenlistment. The court stated that while "Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the 'War Powers' . . . Congress is 'without power to *reduce expenditures* by abrogating contractual obligations of the United States.'" 533 F.2d at 1179-80 (*quoting Lynch*, 292 U.S. at 580) (emphasis in original).

In *POSSE*, this Court confirmed again, citing *Perry* and *Lynch*, that "Congress does not have the power to repudiate its

[32] The obligations the United States attempts to repudiate here involve the express pledge of the faith of the United States, and are, therefore, similar to those in *Perry*.

own debts, which constitute 'property' to the lender, simply in order to save money." 477 U.S. at 55.

In the face of this overwhelming authority, HUD candidly recognized in the Ninth Circuit that "[t]he United States is not free to repudiate its debt solely in order to reduce public expenditures." HUD Ninth Circuit Brief at 43. Here HUD is somewhat less forthcoming, but it never reaches the point of claiming that Congress can abrogate the United States' own contracts to save money. Rather, HUD focuses its energies on futile efforts to find some other purpose for Section 801.

2. Section 801 Was Passed To Save Money

The text of Section 801 confirms the Ninth Circuit's conclusion that Section 801's purpose was simply to save money. *Alpine Ridge*, 955 F.2d at 1387-88, Pet. App. at 14a. Retroactively, Section 801 simply reduces the base number to which the AAAF is applied, thereby reducing the amount of the payments to owners. *See supra* p. 13. Prospectively, Section 801 requires HUD to prepare AAAFs for smaller areas, but permits HUD to set rents directly through "comparability studies" in certain cases. *See supra* p. 14. The only effect of permitting direct adjustment of rent on the basis of case-by-case "comparability studies" is to reduce HUD's financial obligations to the owners.

The legislative history of Section 801 confirms that saving money was its purpose. The only apparent difference of opinion among its supporters was the amount of the anticipated savings.[33] For example, Senator D'Amato, Chairman of the Housing Subcommittee, a co-sponsor of the 1989 Act and an advocate of HUD's new rent adjustment formula, said that "[w]ithout a legislative remedy, the Federal Government would

[33] The bill was introduced in October 1989 and passed by Congress in December 1989 without committee hearings or reports. Statements made in the course of brief floor debate are, therefore, the principal legislative history of the bill.

have been forced [as a result of the *Rainier* decision] to pay over $600 million" to project owners, based on the original HAP Contracts, and that Section 801 "reduces this loss to $210 million — a savings of over $390 million." 135 Cong. Rec. S16,608 (daily ed. Nov. 21, 1989) (statement of Sen. D'Amato). The section-by-section analysis that accompanied the Senate bill noted that compliance with the contract would cost $600 million to $1 billion nationwide, whereas the "retroactive solution" would cost only $210 million. 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). Recognizing legislative legerdemain when he saw it, Senator Sasser, Chairman of the Budget Committee, saluted Section 801 as a "fix" that "could save the Federal government hundreds of millions, if not more than a billion dollars." 135 Cong. Rec. S16,607 (daily ed. Nov. 21, 1989) (statement of Sen. Sasser).

Members of the House shared the same opinions. Congressman Wylie stated that Section 801 "will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million." 135 Cong. Rec. H9690 (daily ed. Nov. 21, 1989) (statement of Rep. Wylie). Representative Gonzalez supported Section 801 because "if Congress did not act on this matter, the potential liability for the Government would amount to $2.1 billion over 10 years .... The resolution would reduce retroactive costs to $210 million and reduce prospective costs to $500 million over 10 years." 135 Cong. Rec. H9686 (daily ed. Nov. 21, 1989) (statement of Rep. Gonzalez). Congress' insistence on the savings Section 801 would bring demonstrates what its true purpose was.

In the District Courts, HUD argued that Section 801 had four purposes other than saving money. The District Courts carefully considered and rejected each of those purported rationales. *Alpine Ridge Group*, 764 F. Supp. at 1400, Pet. App. at 29a; *Acacia Villa, 774 F. Supp. at 1250*, Pet. App. at 57a-58a. On appeal, HUD argued only that the purpose of Section 801

was to resolve widespread disputes over HUD's use of "comparability studies" in adjusting Section 8 rents. *See* HUD Ninth Circuit Brief at 45, 47. The Ninth Circuit rejected this justification because the Constitution does not permit:

> Congress to legislate a compromise to disputes involving vested property rights in order to prevent costly and wasteful litigation. HUD's argument again assumes the absence of any vested property right in annual formula rent adjustments, an issue that we have decided against it.[34]

In this Court, HUD makes half-hearted attempts to revive the arguments it abandoned on appeal in the Ninth Circuit. *See* HUD Brief at 8, 42. Primarily, however, HUD now relies on a newly invented rationale, namely "to restore uniformity to the program's operation." HUD Brief at 14; *see* HUD Brief at 41. HUD does not cite a single line of legislative history to support its new contention that national uniformity of administration was the goal of Section 801. If uniformity were the goal HUD could, of course, achieve that goal by using the AAAF and publishing AAAFs for smaller markets where necessary. In any case, a desire to restore uniformity by refusing to honor the decision of a United States Court of Appeals is not a goal which justifies abrogating vested contract rights. If HUD were correct that Congress is permitted to restore uniformity in this way, no rights under a contract with the government would enjoy any legal protection. A victory in the courts would be self-defeating

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[34] *Alpine Ridge Group*, 965 F.2d at 1387, Pet. App. at 14a. The *Acacia Villa* court dismissed the purported justification of dispute resolution as "little more than bootstrapping. The dispute is about the fact that the contracts have been interpreted adversely to the government by the Ninth Circuit; the government now wants to avoid paying the project owners the amount that the contracts, as so interpreted, require. Again, the government is only concerned with dollars." 774 F. Supp. at 1250, Pet. App. at 59a; *see Alpine Ridge Group*, 764 F. Supp. at 1400, Pet. App. at 29a.

since it would, according to HUD's logic, provide justification for Congress to abrogate the rights vindicated by the court decision.[35]

Once the *post hoc* rationalizations invented by HUD's lawyers are revealed for what they are, it is clear that the primary purpose, indeed the only purpose, of Section 801 is to save money. As the Ninth Circuit held, under this Court's precedents, legislation that abrogates vested rights under government contracts with private parties to save money is unconstitutional. *Alpine Ridge*, 955 F.2d at 1387-88, Pet. App. at 14a.

E. Section 801 Cannot Withstand The Scrutiny Applied To All Federal Legislation That Abrogates Federal Contracts, Even Legislation Which Has A Primary Purpose Other Than Saving Money

Even if HUD's lawyers had succeeded in showing that Congress' primary purpose was restoring uniformity, Section 801 could not withstand the scrutiny applied to legislation that abrogates a federal contract in the course of implementing economic or social policy.

This Court has not directly answered the question of what standard of review applies to Federal economic and social legislation which destroys rights under contracts between the Federal government and private parties. This Court's cases, however, support the conclusion of the Seventh Circuit that when federal legislation interferes with rights under contracts to which the federal government is a party, "the special circumstance of the federal government's taking legislative action

[35] The hollowness of HUD's new-found rationale is highlighted by the fact that at the time Section 801 was passed, the Ninth Circuit's interpretation of the HAP Contracts was the only judicial interpretation of those contracts. No court outside the Ninth Circuit had spoken to the question. It would be unheard of for Congress to take upon itself to solve disputes among the Circuits concerning contract interpretation, but in this case there was not even a dispute.

which impairs a contract to which it is a party" justifies stricter scrutiny under the due process clause than that applied to economic and social legislation which impairs contracts to which the federal government is not a party. *Peick v. Pension Benefits Guaranty Corp.*, 724 F.2d 1247, 1264 n.22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

The Contract clause does not apply to the federal government and, therefore, federal economic and social legislation that impairs contracts *between private parties* will be sustained if it has a rational basis. *See Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-31 (1984). When, however, federal legislation deprives private parties of vested rights under contracts with the United States, this Court's reasoning in *United States Trust Co.* applies:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[36]

Although this Court had before it in *United States Trust Co.* a state statute which implicated the Contract Clause, it made clear that a "dual standard of review" is applied under the Fifth Amendment to federal legislation that abrogates contracts, quoting the "clear distinction" perceived by *Perry* "between the power of the Congress to control or interdict the contracts of private parties . . . and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." *United States Trust Co.*, 431 U.S. at 26 n.25 (*quoting Perry*, 294 U.S. at 350-51).[37]

[36] *United States Trust Co.*, 431 U.S. at 26.

[37] HUD argues that because federal impairment of contracts between private parties is subject to less stringent review than state impairment of

The lack of uniformity that HUD now claims Section 801 is designed to resolve arises out of HUD's refusal to honor its obligations under the HAP Contracts outside the Ninth Circuit. HUD claims that the fact that it felt compelled to honor owners' rights in the Ninth Circuit, but could avoid doing so in other areas, is sufficient justification for legislation abrogating those rights throughout the country. To state the argument clearly is to refute it. If this were sufficient reason to justify abrogating a government contract to which the faith of the United States has been solemnly pledged, government contracts would be meaningless since the government could always refuse to honor contractual rights, defend unsuccessfully against litigation, and then "restore uniformity" by legislatively abrogating the rights the courts had upheld.

In summary, Section 801 would not pass scrutiny under the Due Process Clause even if it were understood as abrogating contractual provisions in the course of creating economic or social programs. Certainly Section 801 cannot be sustained for what it truly is: a measure which directly abrogates government contracts to save money.

---

contracts between private parties, the standard enunciated in *United States Trust Co.* for state legislation that impairs the state's own contracts, "reasonable and necessary to serve an important public interest," does not apply to federal legislation that impairs federal contracts. HUD Brief at 36 n.35. This Court has not spoken to whether the "reasonable and necessary to serve an important public interest" standard applies to federal impairment of federal contracts. It has, however, clearly indicated that the standard for review of federal legislation that impairs federal contracts is higher than rational basis.

CONCLUSION

For these reasons, the judgment of the Court below should be affirmed.

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In The

Supreme Court of the United States

October Term, 1992

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v.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT ALPINE'S BRIEF ON THE MERITS

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135 Cong. Rec. (daily ed. Nov. 21, 1989):
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Farnsworth, Contracts pp. 516, 548 (2nd Ed. 1990) 30, 31

Nowak on Constitutional Law (1983) p. 477 47

R. Posner, Economic Analysis of Law p. 69 (2nd Ed.) 30

Council of State Housing Agencies (Oct. 26, 1987) 21, 30

Financing for Section 8, Journal of Housing, (Sep. 1977) p. 448 38

Housing Development Reporter, Nov. 27, 1989 p. 506 23

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Random House Thesaurus College Ed. 1987, p. 487-88 33

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No. 92-551

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CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

In addition to the matters relied on by petitioners, the Court is referred to 24 C.F.R. 880.102, 880.103, 880.108, 880.110(b) and (d), and 880.125(e), all as originally published (April 29, 1975) (Appendix E); and 24 C.F.R. 888 in its entirety (Appendix D).

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a key financial provision of "bargained for agreements for which plaintiffs [paid] independent consideration."[1] The agreements included an express provision "pledging the full faith and credit of the United States."[2] Private lenders, and bond rating agencies, accepted the agreements as security for loans made to plaintiffs to fulfill their obligations under the agreements.[3]

In the trial court, HUD conceded that Section 801 of the 1989 HUD Reform Act substantially impaired the financial provisions of plaintiffs' agreements. Based on HUD's concession, the trial court found:

> HUD does not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights.[4]

On appeal to the Ninth Circuit, HUD did not challenge the trial court's finding. Accordingly, the Ninth Circuit observed:

> HUD does not dispute that Section 801 substantially impairs the owner's exercise of these property rights.[5]

Now, for the first time, HUD challenges the trial court's findings on this important issue. As the centerpiece of its brief, HUD argues:

> Section 801 does not work a substantial impairment of that [contract] right.[6]

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[1] Pet. for Cert. p. 26a.

[2] Pet. for Cert. p. 27a.

[3] See typical security agreement (J.A. 7) and HUD comfort letter in a Section 8 bond financing transaction (J.A. 12.)

[4] Pet. for Cert. p. 27a.

[5] Pet. for Cert. p. 12a.

[6] Pet. Brief p. 13.

HUD's attempt to now raise the issue of "substantial impairment" is deplorable. Unfortunately, HUD appears incapable of appreciating the importance of proper procedure.[7] HUD prefers instead to corrupt procedures through euphemisms and fictions. A brief comparison of the respective positions of the parties[8] will highlight some of those fictions.[9]

1. The Fact – HUD Reneges On Its Contracts

In 1974 the Ford Administration hit on a plan for the private sector to take over the government's job of housing the poor. Under what is known as the Section 8 new construction program,[10] HUD induced private developers to sign long-term contracts to build, own, operate and maintain specialized rental housing for the elderly, handicapped, and poor at specific locations selected by HUD. For the developers it was a high risk program to perform a government function (housing the poor) with the incentive for profit and the risk of loss.

A principal inducement to the developers was HUD's election, by contract, of "formula" rent adjustments to keep pace with the hyper-inflation of the

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[7] HUD also raises the issue of "ripeness" (Pet. Brief p. 34, n.33). That issue was decided against HUD in the trial court, but was not appealed to the Ninth Circuit. See also n.137 *infra*.

[8] Plaintiffs' statements are based on the affidavits of Dean Chaussee (J.A. 25), and Warren J. Daheim (R. 18), the declarations of Jona Goldrich (J.A. 36) and Janet Marie (J.A. 52), and the various regulations, handbook provisions, and other materials contained in the Appendix to this brief and *Alpine's* brief in opposition to the Pet. for Cert. Those affidavits and declarations have never been challenged.

[9] It is impossible in the space allotted to comment on every one of HUD's misstatements. As Emerson said: "Their every truth is not quite true . . . so that every word they say chagrins us and we know not where to begin to set them right."

[10] 42 U.S.C. 1437f. The statute covers a number of programs. The only one at issue here is the program for developers to build or substantially rehabilitate housing for the poor.

1970s.[11] The adjustments were to be automatic, open (published in the Federal Register), objective (based on rent movement factors), and uniform (treating all projects in the same area equally). The process was to be immune from bureaucratic whim. In the trial court, HUD did not dispute that plaintiffs would not have entered into Section 8 contracts without the provision.

In 1981, under budgetary pressures, HUD attempted to renege on its election in an effort to save money. On an "ad hoc and capricious basis",[12] HUD refused to grant the "automatic" adjustments which its own factors indicated were due. Instead, HUD proceeded to cut (not cap) *existing* rents, in many cases cutting below the amount necessary to pay operating expenses.

When challenged, HUD claimed it was only carrying out a statutory mandate to keep Section 8 rents in line with market rents. HUD claimed the right to implement the mandate in any manner it chose, overriding its election by contract of formula rent adjustments. In *Rainier View Associates v. United States*,[13] the Ninth Circuit held the statutory mandate must be carried out, as it had been from the beginning, *within the framework* of HUD's contractual election of a formula method of rent adjustment.

After *Rainier View*, HUD ran to Congress to "bail it out." Congress obliged, since the temptation to save money was irresistible. It passed Section 801 of the HUD Reform Act, which "fixed" *Rainier View* by requiring owners to accept 30¢ on the dollar for past rent adjustments wrongfully withheld and nonformula rent

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[11] In 1971, President Nixon imposed wage and price controls. In 1975, President Ford promoted the WIN program (Whip Inflation Now).

[12] H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987).

[13] 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). See Appendix A, *Alpine's* Brief in Opp. to Pet. for Cert.

adjustments in the future. This case challenges Congress' attempt to abrogate the owners' contract right to formula rent adjustments.

2. The Fable – HUD And The Public Fisc

To mask its conduct, HUD creates a fable. HUD's legal arguments are based entirely on the fable.[14]

In the fable, greedy landlords attack the public fisc seeking a "windfall"[15] through "above market"[16] rents. HUD defends the fisc, armed with a statutory mandate. The Ninth Circuit intrudes, commanding HUD to lay down its mandate. Rendered defenseless, HUD turns to Congress for relief. Congress ends the controversy by generously putting the ungrateful landlords "in a better financial position than their contracts guaranteed."[17] The fable ends with Congress having restored a "smooth and effective operation of the Section 8 program."[18]

The fable is just that – a fable. It is fiction, not fact. The fable is belied by the undisputed record.

The first fiction is that the Section 8 new construction program was designed to provide "prevailing market rents."[19] The fact is the Section 8 new construction program was designed to produce housing that the market had not and would not produce.[20] Since the housing was not "market" housing, rents were not "market" rents.

The next fiction is that plaintiffs are making or seeking a windfall profit. This fiction, and in turn all of

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[14] An amicus brief filed by the AFL-CIO relies on the same fable.

[15] See e.g., Pet. Brief pp. 14, 38, 40.

[16] See e.g., Pet. Brief pp. 14, 39.

[17] Pet. Brief p. 30.

[18] Pet. Brief p. 41.

[19] Pet. Brief p. 3.

[20] Chaussee Aff. (J.A. pp. 30-34).

HUD's arguments, are based on the results of a process described as "farcical."[21] The fact is there is no evidence whatsoever of any profit, much less windfall profit. The fact is, as the district court found:

> Plaintiffs have demonstrated great hardship. Some plaintiffs have foregone all return on their investment; others have no money for necessary repairs; and still others are now teetering on the brink of foreclosure.[22]

The next fiction is that HUD is a law-abiding agency frustrated in its attempt to carry out a statutory mandate. The fact is that HUD is an agency run amok, repeatedly chastised by Congress for cutting rents in disregard of congressional intent,[23] and by the district court for ignoring direct orders to clean up its rent adjustment process.[24]

---

[21] Appendix A. The trial court in *Rainier View* found that defects in the process were so egregious that HUD's comparability studies violated procedural due process. See Order Jan. 15, 1986. Reproduced in *United States v. Rainier View Associates*, Pet. for a Writ of Cert. at 16a, 30a (1988).

[22] Order denying defendant's motion for stay pending appeal (*Alpine* Clerk's Record, No. 111).

[23] H.R. Rep. No. 122, 100th Cong., 1st Session (1987) (Appendix H).

[24] *Rainier View Associates*, CR-83-997R, orders dated January 11, 1986; December 24, 1987 ("In ruling as it does, this Court feels compelled to point out that it is HUD's behavior in this case which makes injunctive relief imperative. Although HUD has not openly defied the Court, it has done absolutely nothing to comply with the Court's rulings until confronted with a direct court order. Even then, HUD has chosen to comply in only the most narrow way possible to avoid a contempt citation."); April 15, 1988 ("The parties are now back again, largely because the government appears incapable of comprehending and obeying the Court's injunctive orders. . . . Perhaps the Court lacks imagination; certainly it failed to conjure up all the possible linguistic loopholes which the government has sought to exploit. Indeed, the Court simply assumed the government would comply in good faith with its statutory and contractual obligations to make annual rental adjustments on all Section 8 projects."); April 16, 1991 ("This is not the first time that HUD, despite adverse judicial rulings, has been reluctant to fulfill its contractual obligations.") (Appendix D to Pet. for Cert.).

The next fiction is that the Ninth Circuit prevented HUD from exercising its mandate. The fact is the Ninth Circuit simply held that the mandate must be exercised, as it had been from the beginning, within the framework of HUD's contract election of a formula method of rent adjustment.

The final fiction is that the owners should be grateful for whatever HUD deigns to give them, regardless of their contracts. Underlying this fiction is HUD's repeated claim that Section 8 is a social welfare (i.e., gratuity) program[25] for owners. The fact is that owners committed to long-term "bargained-for" agreements for which they paid valuable consideration – they "built and maintained low-income housing in accordance with HUD's requirements."[26] Their reward for participating in a risky social program is to be accused of seeking a windfall profit.

B. Counterstatement Of Facts

It is critical for the Court to understand the background and purposes of the Section 8 new construction program, HUD's representations, the parties' mutual understanding, the practical operation of the rent adjustment process, and what HUD was actually doing under the guise of "comparability."[27] Without such understanding, it is easy to fall for HUD's fable.

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[25] Pet. Brief pp. 14, 37, 40, 43.

[26] Pet. for Cert. 53a.

[27] The undisputed record supports plaintiffs' counterstatement of facts. See n.8 *supra*.

1. Section 236 – A Disaster

Section 236 was the predecessor to Section 8 as a low income housing program. Section 236 combined federal mortgage insurance with subsidized interest payments to mortgagees (lenders) in order to reduce the mortgagor's (owner's) monthly mortgage payment. The benefits of the reduced interest payments were to be realized by the tenants of the project in the form of lower rents.

Under a regulatory agreement, Section 236 rents were regulated and annual rent adjustments were made by local HUD employees on a *project-by-project* basis according to operating costs. The project-by-project rent adjustment system was an administrative nightmare, expensive to process and time-consuming for both HUD and the developer. The system often worked on a selective and arbitrary basis, exhibiting favoritism or retribution depending on which employee administered an adjustment and which owner made the request. Rejected and delayed rent adjustments resulted in deferred maintenance, cuts in services, vacancies, and defaulted mortgages. Since the mortgages were government insured, developers simply walked away from the projects, leaving HUD to foreclose.[28] In 1974 HUD formed a special task force to deal with defaults under Section 236 and make appropriate recommendations to HUD.

2. The Section 8 Program

> The Committee has accepted the essence of HUD's recommendation which is to give private developers the incentive for profit and the risk of loss in the construction and management of housing development for low income families.
>
> S. Rep. No. 693, 93d Cong., 2d Sess. (1974) *reprinted in* 1974 U.S. Code Cong. & Admin. News 4273, 4314.

[28] Some of the problems with the predecessor programs were described in the House Report accompanying enactment of Section 8 (see H.R. Rep. No. 93-1114, p. 21).

The Section 8 program was enacted in 1974 to resolve the crisis created by the failure of previous programs – particularly Section 236. It was to be simple:

> Q. You were trying to make it simple?
>
> A. Yes . . . [29]

The new program was specifically designed to avoid the problems owners had with Section 236 by using a formula rent adjustment method and not a project-by-project method:

> "And therefore, what they wanted to do is set it up in such a way so that the rents would be adjusted using a rent formula, but that they did not want to get into a staff intensiveness by doing a project-by-project rent determination."[30]

Under Section 8, HUD solicited private developers to submit proposals to design, construct, and operate specialized housing for the elderly, handicapped and poor in specific locations selected by HUD. If a developer's proposal was selected, HUD and the developer negotiated a Housing Assistant Payment (HAP) contract. Under the HAP contract, rents were agreed upon in an amount high enough to induce the developer to sign a contract and participate in the program, with rents to be adjusted annually for inflation.[31] The developer was to collect a portion of the rent (30% of the tenant's income) directly from the tenant.[32] The

[29] Testimony of James Tahash, head of HUD Program Planning Division (See J.A. 28-29).

[30] Ibid.

[31] See discussion pp. 13-17.

[32] Adjustments in rents do not affect the amount of rent the tenant pays, which is based solely on a percentage of the tenant's income. See Comment Fed. Reg. May 1, 1991, p. 20083.

remainder of the rent was to be paid by HUD to the developer, either directly or through a local public housing agency as the contract administrator. HUD regulations contemplated that the developer would pledge the contract to a private lender to obtain financing.[33] The owner and his lender would take all of the risks with no guarantee against loss but with the possibility of making a profit if successful.

HUD aggressively solicited developers and lenders, directly and through HUD sponsored seminars, to convince them that this risky program would be free from the defects of Section 236. The representations made by HUD, and the resulting expectations of the owners, are the keys to understanding this case.

(a) ***Negotiated rents***. The first key to understanding this case is to recognize how the parties arrived at initial contract rents. HUD claims the Section 8 new construction program "was clearly designed to provide prevailing market rents."[34] This statement is false.[35] The falsehood is critical because it permeates HUD's misdescription of the new construction program.[36]

Initial rents under the new construction program were *not* market rents. Initial rents were *negotiated* rents, based on the costs of construction. Initial rents

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[33] See 24 C.F.R. 880.125(e) (Appendix E) (use of contact as security for financing).

[34] Pet. Brief, p. 39.

[35] HUD confuses the new construction program and the existing housing program. Under the existing housing program, rents are market rents since the housing was built as market housing (not under the Section 8 program) and formerly rented as such. There is no reason, other than HUD red tape, why existing housing should rent for more simply because it is rented to low income tenants.

[36] See e.g. Pet. Brief p. 3 ("bring the owners total rental income up to the prevailing market level"); p. 14 ("a contract that was never intended to pay above-market rent"); p. 39 ("The Section 8 program was clearly designed to provide prevailing market rents").

were not market rents for the simple reason that there was no comparable rental housing. Indeed, the sole purpose of the new construction program was to produce rental housing that the market had not produced.[37] The market had not produced the desired rental housing because there were no tenants willing and *able* to pay the rents necessary to justify the construction of specialized housing at the locations selected by HUD.

Since "market" rents did not exist for the locations HUD selected, HUD came up with an artificial concept of "Fair Market Rent." This term was defined by regulation as those rents "required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design . . . ".[38]

Since newly constructed rental housing of similar design and amenities did not exist at the locations specified by HUD, Fair Market Rent came to be based on costs. These costs generally exceeded "market" costs by over 50%, due to HUD's special construction requirements and Davis Bacon wage rates. As a result, Fair Market Rent, and the companion requirement that rents be "reasonable,"[39] were interpreted by HUD as justifying the rents necessary to make the projects

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[37] HUD regulations provided that "New construction projects shall be permitted only where . . . HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing . . . [to] meet the needs of eligible families." 24 C.F.R. 880.103 (April 29, 1975) (Appendix E).

[38] 24 C.F.R. 880.102 (April 29, 1975) (Appendix E). HUD claims that initial rents were not to exceed "prevailing market rents" by more than 20%. (Pet. Brief p. 3). That statement is false. Initial rents were not to exceed "Fair Market Rent," by more than 20%. Fair Market Rent is an artificial concept, as shown above.

[39] 24 C.F.R. 880.108 (April 29, 1975). (Appendix E).

financially feasible.[40] Otherwise, the program would not have gotten off the ground.

For example,[41] in 1979 HUD advertised for proposals to build housing for the elderly in Puyallup, Washington, a town with a population of less than 30,000. Retirement housing already existed in Puyallup, but rented for $800 to $900 a month, which was far too much for a senior citizen trying to live on a $600 monthly social security check. As a result, many of Puyallup's elderly lived in substandard housing. They simply could not afford to pay for decent housing close to transportation and medical and community services.

In response to HUD's invitation, Ray Dally, a local builder, submitted a proposal. His proposal was to build 25 one bedroom apartments in a three-story, brick, elevatored building. It would have a mechanical core, elevator machinery room, elevator shaft, elevator lobbies on each floor, extra wide interior hallways and stairways with handrails down both sides of the stairs and halls, social hall, handicapped restrooms and an entry security system which was remote controlled by each individual resident from his own apartment. Each apartment had an emergency call light, bathroom grab bars, smoke detectors and automatic fire alarms. The project was near downtown, on expensive land, close to transportation, medical and community services. With a view of Mt. Rainier, it was to be named "Rainier View."

Dally's proposal was accepted. Dally and HUD agreed by contract that the initial rents for an apartment would be $315 a month. The contract was pledged by Dally to a local bank to secure conventional financing for the project. From the viewpoint of Dally and his bank, the contract rent of $315 was required to justify

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[40] Chaussee Aff. (J.A. 33).

[41] Taken from the record in *Rainier View.*

Dally's high cost of building and financing a specialized building under HUD regulations.

The rent of $315 was also agreeable to HUD, even though recently constructed one bedroom apartments in Puyallup rented for $200. Nonetheless, HUD internally determined that the Dally rents were "reasonable" in light of HUD's special requirements and the uniqueness of the project. There would be nothing like Rainier View in the City of Puyallup, except for retirement housing which rented for two or three times the Rainier View rent. Certainly the wood frame walk-up apartments in the area which rented for $200 were not comparable.

In any event, HUD *agreed* to the original rents. In doing so, HUD interpreted its authority under the Act to justify the rents which were necessary to make the project financially feasible and induce Dally to build. In no sense were those rents "market" rents. They did, however, establish a *relationship* to the market. HUD *guaranteed* that that relationship would be preserved.[42]

(b) ***Automatic annual rent adjustments***. The second key to understanding this case is to recognize how rents were to be adjusted. To attract the private sector to the Section 8 program it was necessary to insure that rents would be periodically adjusted to keep pace with inflation. That meant that the *relationship* of the initial rents to the market would be preserved.

For example, Ray Dally's original rents were $315 due to the uniqueness of the Rainier View project. At the same time, new walk-up apartments in the area rented for $200. Ten years later, if the $200 rent had increased by 50% to $300, Dally's $315 rent was to have increased 50% to $472.50. Only in that way could Dally be assured of receiving a return on his investment proportionate to what he would have received had HUD not induced him to enter the Section 8 program.

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[42] See discussion *infra* pp. 15-16.

The Section 8 statute provided two ways to make periodic rent adjustments.[43] One way was by market surveys. The other way was by use of a reasonable formula. Whichever way was selected, the adjustments were to reflect rent movement in the non-assisted market.[44]

To attract the private sector, and to carry out the twin mandates of the statute (select an adjustment method, and make sure it accurately measures inflation),[45] HUD adopted regulations[46] and prepared contracts which used a *formula method* of rent adjustment. Section 1.9 of the standard HAP contract provides:

> b. *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
>
> (2) On each anniversary date of the contract, the Contract Rents *shall* be adjusted by applying the applicable *automatic* annual adjustment factor most recently *published* by the government.

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[43] See Section 8(c)(2)(A) (Appendix B).

[44] See Section 8(c)(2)(C) (Appendix B).

[45] The owners were not expecting "excessive rent adjustments" (Pet. Brief p. 4). But they did reasonably expect that the relationship of their rents to the market would be maintained by published factors. They also reasonably expected to make a profit if they did a good job of operating their apartments. Receiving what one party fairly contracted to pay and the other fairly contracted to receive is not a windfall. See *United Firefighters v. Los Angeles*, 259 Cal. Rpt. 65, 70 (Cal. App. Dist. 1989).

[46] 24 C.F.R. 880.110 (April 29, 1975) (Appendix E.)

* * *

> d. *Overall Limitation.* Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; ***provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.***

The two provisions (published automatic annual adjustments and overall limitation) must be read together and harmonized. Taken alone, the provision for automatic annual adjustments gives little guide to the basis for selecting factors.[47] The overall limitation supplies that basis. It directs that the factors selected by HUD shall maintain, without increasing or decreasing, the *relationship* between the initial rents and market rents. The italicized language of the overall limitation clause *guarantees* that the *relationship* will

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[47] In 1983 HUD seized on this fact in an attempt to justify basing factors on changes in operating costs, rather than changes in market rents. The attempt was dropped after sharp criticism from Chairman Gonzales of the House Subcommittee on Housing: See *Section 8 Rent Adjustments, Elderly Housing and Other Assisted Housing Issues: Hearing Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs*, 98th Congress 2d Sess. (1984). HUD now singles out a comment made at that hearing by a private attorney, takes the comment out of context, and claims that it supports HUD's post 1981 interpretation (Pet. Brief p. 24). All that the witness meant (counsel of record was there and also testified) was that rent adjustments were to be based on market movement, not operating costs as HUD was then proposing.

be preserved.[48] In other words, the factors should measure the *movement* in market rents and adjust rents accordingly, thereby preserving the original relationship. This is exactly how HUD interpreted and administered the rent adjustment process until 1981.

In the course of administering these two provisions, HUD annually selected Automatic Annual Adjustment Factors ("AAAFs") based on the *movement* of rents in selected geographic areas, and published those factors and the basis for their selection in the Federal Register. The factors were percentages, required by regulation to be applied against current rents to produce the new rents. For example, if the rental movement factor is 5% and the current rents are $350 per month, the adjusted rents for the following year would be 105% of $350, or $367 per month.

The process was open (published), objective (based on rent movement factors), and uniform (treating all projects in the same area equally). It was the direct opposite of the subjective, secret, complex and time-consuming process of Section 236.

HUD's original understanding of the program was described by a number of HUD officials. Lynn Stowell, a HUD Director of Housing testified:

> "Q. The automatic adjustment process, the way you understand it, was basically an inflation hedge, was it not?
>
> A. Yes.
>
> Q. And that was the way it was explained to developers and lenders?
>
> A. Yes.
>
> Q. I am not trying to put words in your mouth, but so that if market rents went up

[48] Since the initial relationship was expressly protected, "material" differences would automatically be avoided so long as the factors selected by HUD mirrored inflation in market rents.

> 15%, you would expect contract rents to go up 15%?
>
> A. Yes."[49]

(c) ***Full faith and credit.*** The third key to understanding this case is to recognize the nature of the promise made by the government. As a final inducement to attract owners and lenders to invest in Section 8 housing, HUD inserted language in the contracts typical of government bonds, solemnly pledging the full faith and credit of the federal government:

> 1.6 Government Assurances To Owner. The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and that funds have been obligated by the government for such payments.[50]

Based on these assurances, hundreds of lenders and developers in the private sector entered into Section 8 contracts and constructed thousands of housing units in the locations selected by HUD. The program ran smoothly from 1974 to 1981. Each year, HUD designated the geographical areas, selected the factors, and adjusted rents to maintain the initial relationship between Section 8 and market rents.[51]

[49] See *Rainier View*, Excerpts of Record 64.

[50] Aff. of Warren J. Daheim, Ex. A, par. 1.6 (R.18).

[51] HUD complains that some geographical areas are broad and that the factors cannot protect against economic variations within those areas. Of course this ignores the fact that *HUD selects the geographical areas.* The fact that some areas are broad reflects a conscious choice by HUD, which was to HUD's benefit. For example, by combining high and low inflation areas in calculating a single factor, HUD was able to use a lower average factor than justified for a large number of projects. HUD would benefit if most of the projects were in the high inflation area. Taking the example cited by HUD (Pet. Brief, p. 17, n.13) projects in Southern California were arguably paid too little and projects in Eastern Washington were arguably paid too much. Since there are many more

The process can be traced through HUD regulations, handbooks, and detailed written methodologies. It started with factors developed by the economic analysis arm of HUD using rental market information derived from the CPI, the American Housing Survey, and from "any other data sources or market analysis."[52] As early as 1976 (the first year that adjustment factors were published), HUD recognized that a more refined procedure was necessary and asked the public for suggestions.[53] As a result, HUD regulations were revised in 1977 to provide that HUD field offices would make factor revisions where local conditions warranted.[54] As revised, 24 C.F.R. 888.202 reads as follows:

> Schedule C Adjustment Factors will be published in the Federal Register at least annually. Interim revisions may be published as market conditions indicate. *In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors* (revisions italicized).[55]

HUD handbooks were amended to provide detailed procedures for HUD field offices to revise the factors if they were either too high or too low.

Section 8 projects in Southern California than there are in Eastern Washington, HUD obviously lumped them together to reduce rent increases overall.

[52] *Alpine* Brief in Opp. to Cert., Appendix B and C. Even different time periods were used in calculating "inflation for the San Francisco and Anchorage SMSAs . . . to avoid questionable short-term fluctuations in the CPI indexes for those areas." (Appendix B). This statement alone belies HUD's argument that it paid little attention in calculating its own factors.

[53] Fed. Reg. Nov. 8, 1976, p. 4944 (See Appendix F).

[54] Fed. Reg. Nov. 25, 1977, p. 60508 (Appendix F).

[55] See 24 C.F.R. 888.202 (Appendix D).

> Pursuant to Section 880.110(d),[56] [the overall limitation] the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3).[57]

In light of the above history, HUD's statement that it did nothing until "the early 1980s"[58] to enforce comparability is simply false.

3. HUD Reneges On Its Contract

In 1981, as inflation drove Section 8 rents higher and federal housing budgets became smaller, some HUD offices took it upon themselves to ignore the automatic annual rent adjustment process. Instead of comparing the *movement* of rents and translating it into factors, certain offices started to recompare projects, invariably concluding that the Section 8 rents were "excessive."[59] Instead of a system which maintained the original relationship and moved rents upward or downward according to market conditions, HUD attempted

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[56] See 24 C.F.R. 880.110 (Appendix E). The regulation was changed in late 1979 to apply to contracts executed later. As changed, it is designated 24 C.F.R. 880.609 (see Pet. Brief p. 6a).

[57] HUD Handbook May, 1978 (Appendix G).

[58] Pet. Brief p. 6. Factors may also be revised under 24 C.F.R. 888.204 (Appendix D) on request by the owner. Interestingly, HUD recently argued in another case that the *only* method for *owners* to enforce comparability was to seek a factor adjustment under 24 C.F.R. 888.204. That is exactly plaintiffs' argument, only in reverse. Apparently what is good for owners is not good enough for HUD. See *Park Village Apartments v. U.S.*, 25 Cl. Ct. 729 (1992).

[59] See Pet. Brief p. 6. Neither the statute nor the contract refer to "excessive" rents. The mandate is to keep rents in line with market rents. That means that the original relationship of Section 8 and market rents is to be maintained.

to destroy the original relationship. The purpose of the process changed from maintaining the relative value of the original rents to undercutting that value.[60]

To the extent that chaos can be called process, the process began with untrained HUD clerks (not appraisers) calling around to see if they could find any "comparable" rents that were lower than the Section 8 project arbitrarily selected for review. Of course, they always did, even if they had to "compare" a downtown high-rise Section 8 project for the elderly with a dilapidated walk-up apartment on the edge of town.[61]

By "recomparing" projects, HUD undermined the original relationship between the Section 8 project and the market, in direct violation of its written promise. It was as if original rents had never been agreed upon. Invariably, HUD's new process resulted in rent adjustments lower than those based on the *movement* of rents. In many cases the new process was used not only to deny increases, but to substantially *cut* existing rents, regardless of the impact on the owner.[62]

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[60] HUD's true purpose is revealed in recent directions to field offices processing retroactive rent payments under the law at issue in this case. HUD stated:

> "Before calculating the amount of any retroactive payment, the PHA, if directed by HUD, will review whether rents were excessive when initially set." Fed. Reg. May 1, 1991, p. 20086.

This direction reveals HUD's mind set. First, rents were not "set" by HUD, they were agreed upon between HUD and the developer. Second, HUD is expressly prohibited by the overall limitation from revisiting its original agreement on rents. The developer relied on those rents in making his decision to proceed with the project. Both parties must live with their bargain.

[61] For an example of such comparisons, see the photographs in Appendix A. The process was described by an independent MAI appraiser as "farcical." HUD used the comparison to *cut* existing rents on the Section 8 apartments from $487 to $354 per month.

[62] H.R. Rep. No. 122, 100th Cong., 1st Sess. (1987) (Appendix H); and see p. 6 *infra*.

All of this was done without regulations, handbooks, or any other guidelines.[63] The reports of trained appraisers challenging HUD's "comparability" studies were ignored. If hearings were allowed, neither the owner nor his representative were allowed to ask questions. Normally the HUD official who cut the rents made the determination whether or not he would undo his own handiwork.[64]

To illustrate, if Dally's rents should have gone to $472.50 based on market movement, they were instead *reduced* to $375 by "comparing" his well located brick high rise apartments with two story wooden walk up apartments on the edge of town. This destroyed the original relationship of Dally's apartments to the market. Worse yet, the objective rent system Dally had bargained for was now replaced by a subjective system vulnerable to bureaucratic whims of favoritism or retribution. Instead of being able to rely on uniform published factors open to public scrutiny, evenly applied to all, Dally was subjected to back room manipulations of rent which he originally had been assured went out with the discredited Section 236 program.

4. The *Rainier View* Case

Shortly after HUD began cutting rents, the plaintiffs in *Rainier View* filed suit challenging HUD's actions. HUD justified its rent cutting by reference to the "overall limitation" clause. HUD now saw this clause not as a limitation on the selection and modification of the factors and geographic areas, but as an

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[63] On page 6 of its brief, HUD describes a process that HUD tried to implement in 1986 in response to early rulings in *Rainier View*. It was followed only sporadically. See memo from Council of State Housing Agencies, October 26, 1987 (copy lodged with Clerk). What was really happening was described in a stipulation of the parties in *Rainier View* (copy lodged with Clerk).

[64] From record in *Rainier View*. See also Appendix A.

independent rent adjustment method.[65] HUD had yet to invent its two-tiered or "capping" argument, an argument which cannot explain *cutting* existing rents.

After a thorough review of the statute, the regulations, and the contracts, all in context, the Ninth Circuit ruled that the contract *unambiguously* requires HUD to use the formula rent adjustment method. It held that HUD had elected by contract the formula method over a market survey method and could not circumvent that election under the pretext of keeping assisted rents in line with market rents. The court held that HUD was required to keep "assisted rents in line with market rents"[66] within the framework of the rent adjustment method HUD wrote into the contract, just as it had for seven years before the budget crisis in 1981.

5. HUD's Response

HUD represented to the Ninth Circuit,[67] and announced to Section 8 owners throughout the Ninth Circuit,[68] that it would acquiesce in the *Rainier View* decision and commence making full adjustment factor payments. Instead, HUD proceeded to ask Congress for authority to do precisely what the Ninth Circuit had ruled it could not do; that is, repudiate its contractual election to use a formula method of rent adjustment. HUD submitted legislation to Congress which would

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[65] For statement of the issue as framed by HUD see n.93 *infra* and related text.

[66] *Rainier View v. United States*, 848 F.2d at 991.

[67] See p. 3 of HUD's Petition for Limited Rehearing Case Nos. 88-3630, 88-3841.

[68] See HUD memorandum of May, 1989 (attached to plaintiffs' complaint).

overturn the *Rainier View* ruling, retroactively and prospectively.[69]

6. Congress' Response

> The Department of Housing and Urban Development (HUD) may have quietly dug itself out of a potentially expensive hole last week, engineering a resolution to a dispute with low-income housing developers that could save the department as much as $800 million.
>
> *Washington Post*, December 1, 1989.

On November 22, 1989,[70] Congress passed H.R. 1, entitled "Department of Housing and Urban Development Reform Act of 1989" (the "Bill").[71] The Bill deals with a number of HUD abuses reported in the press during the summer and fall of 1989.

Tacked on at the end of the Bill was Section 801, entitled "annual adjustment factors for Section 8 rents." The essence of Section 801 is that Section 8 owners who were victimized by HUD's comparability process are to be further victimized. Owners affected by HUD's comparability process are forced to accept 30¢ on the dollar for monies past due under their contracts.[72] In addition, Section 801 authorizes project by project comparability studies, directly contrary to the contracts. In short, Section 801 permits HUD to do exactly what the Ninth Circuit held was not permitted

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[69] Secretary Kemp introduced the HUD Reform Bill on October 30, 1989. Cong. Rec. H 9685 (Nov. 21, 1989). Section 801 of the Bill addresses the *Rainier View* litigation. See Cong. Rec. S. 16601 (Nov. 21, 1989).

[70] See Housing Development Reporter, November 27, 1989, p. 506.

[71] Pub. L. No. 101-235.

[72] Technically, the Bill provides for factors to be applied only to that portion of contract rent which exceeds debt service (mortgage payments), but no less than 30% of the full factors applied to full contracts rents. For most owners the "30% solution" would be the best of two bad choices.

under HUD's Section 8 contracts.[73] The purpose of the amendment was to "fix" Rainier View and thereby save money.[74]

7. The Decision Below

Plaintiffs challenged Section 801 asking: "does Congress have the power to abrogate the government's bargained-for financial contracts in order to save money?"

The Ninth Circuit held that Congress did not have such power. The court held that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the Fifth Amendment."[75]

The court pointed out that plaintiffs' contract rights were "supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch v. United States*, 292 U.S. 571 (1934) and *Perry v. United States*, 294 U.S. 330 (1935)." The court distinguished the "sovereign powers" doctrine (which does not apply to bargained-for financial contracts), and curative legislation cases (which cure faulty interpretations of statutes, not contracts), and rejected HUD's claim that some rational basis for the legislation existed other than to save money.

SUMMARY OF ARGUMENT

Plaintiffs have a contract right to formula rent adjustments. That right is not overriden, nullified, or "trumped" by HUD's statutory mandate to keep Section 8 rents in line with market rents. The mandate was incorporated into plaintiffs' contracts and means that

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[73] Senator D'Amato, one of the Bill's sponsors, stated: "In addition, the legislation addresses a controversial ruling in the Ninth Circuit relating to the *Rainier View* case." Cong. Rec. S 16601 (Nov. 21, 1989).

[74] See discussion pp. 47-50 *infra*.

[75] Pet. for Cert. p. 14a.

the relationship between Section 8 rents and market rents both must and *will* be maintained.

Plaintiffs' claim is that the relationship must be maintained, as it was from the beginning, within the framework of HUD's contractual election to use a formula method of rent adjustments. Plaintiffs' interpretation should be preferred over the interpretation which HUD, the drafter of the contract, seized upon in 1981 in order to save money. Plaintiffs' interpretation is supported by the background and purposes of the Section 8 program, both parties' original understanding, the actual administration of the program, HUD regulations, and ordinary rules of contract interpretation. Statements by congressmen, thirteen years after the program was adopted, have no bearing on the interpretation of contracts executed between HUD and project owners under the program.

Section 801 of the HUD Reform Act substantially impairs plaintiffs' contract right to formula rent adjustments. HUD conceded this issue in the trial court, did not raise it on appeal to the Ninth Circuit, and cannot raise it here. Moreover, HUD's arguments are based on the fiction that what HUD calls "comparability" was in fact a study of rent movement by qualified appraisers using proper appraisal techniques. That fiction is refuted by the undisputed record.

Section 801 cannot be justified under either the doctrine of sovereign power or the doctrine of curative legislation. Neither doctrine applies to plaintiffs' contracts, which admittedly are bargained-for financial agreements for which plaintiffs paid independent consideration.

Section 801 also cannot be justified by its purpose, which is to save money. The other rationales given (i.e., to fix *Rainier View* and restore uniformity to rent adjustments) do not survive rational analysis, much less the heightened scrutiny required when the government attempts to change its own financial contracts.

ARGUMENT

In the trial court, HUD agreed that there were four elements in analyzing the constitutionality of Section 801.[76]

A. Plaintiffs Have Contract Rights To Formula Rent Adjustments

1. Plaintiffs' Position

Under Section 8, Congress directed HUD to make periodic rent adjustments on the basis of either (1) changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units, or . . . (2) on the basis of a reasonable formula.[77] Congress further directed that whatever method HUD chose, it should not result in material differences from rents charged for "comparable unassisted units."[78] In other words, the adjustments should not overstate or understate the movement of rents in the area.

To induce the private sector to use Section 8, and to avoid costly and complicated procedures, HUD elected the formula alternative. The contract provides that HUD will select factors, the basis of which is published in the Federal Register, to be applied "automatically" and evenly to all projects in an area.[79] To insure that

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[76] Pet. for Cert., p. 19a. In this Court HUD adopts a slightly different analysis, suggested by *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985). However, that case did not involve the government's own contracts. Accordingly, the scrutiny there is less searching, and there was no need to analyze the sovereign power (i.e., vested rights) doctrine.

[77] Section 8(c)(2)(A) (Appendix B).

[78] Section 8(a)(2)(C) (Appendix B).

[79] b. *Automatic Annual Adjustments.*
(1) Automatic Annual Adjustment Factors will be determined by the government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register.
(2) On each anniversary date of the contract, the Contract Rents *shall* be adjusted by applying the applicable *automatic* annual adjustment factor most recently published by the government.

the factors did not overstate or understate rent movement, HUD inserted a provision in the contracts similar to its statutory analog:

> d. *Overall Limitation.* Notwithstanding any other provision of this contract, adjustments as provided in this section shall not result in material differences between the rent charged for assisted and comparable unassisted units, as determined by the government; ***provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial contract rents.***

The overall limitation language of the contract should not be interpreted to make a mockery of HUD's election of a formula (i.e., factor) method of rent adjustment, which measures market movement of rents and is published in the Federal Register. To be consistent with the statutory and contractual framework, HUD should select, monitor and modify its factors based on market surveys which measure market movement of rents. HUD should not be allowed to abandon its own factors[80] and adjust rents on the basis of a project-by-project survey, which does not attempt to measure the market movement of rents and is unpublished.

Plaintiffs' interpretation should be preferred over the interpretation which HUD, the drafter of the

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[80] Provisos are qualifiers, not nullifiers. *See Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D.P. 1966). Provisos are to be strictly construed. See Sutherland, Statutory Construction § 47.08 at p. 135.

contract, adopted in 1981 in order to save money. See Restatement, Second, Contracts § 207, Comments. *See also, United States v. Seckinger,* 397 U.S. 203, 216 (1970):

> " . . . the provision should be construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the government's vast economic resources and stronger bargaining position in contract negotiations."[81]

Plaintiffs' interpretation is also supported by general rules of contract interpretation.[82] HUD's belated interpretation is not.

(a) The intention of the parties controls. In interpreting a contract "the avowed purpose and primary function of the court is the ascertainment of the intention of the parties."[83] Here, the original intention of all the parties was the same. The process was to be simple and automatic. Only later did HUD come up with a different interpretation, as a pretext for cutting rents.

In any event, the meaning given to the language by owners and lenders is controlling because that is the meaning that HUD induced the owners and lenders to understand and act upon. See, *Corbin on Contracts* § 538, at p. 63:

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[81] HUD claims that its interpretation is entitled to deference (Pet. Brief p. 26, n.24), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843. But that case involved an agency's interpretation of a statute, not a contract. The distinction was noted in *Clay Tower Apartments v. Kemp,* 978 F.2d 478, 480 (9th Cir. 1992).

[82] The first rule of interpretation is that the meaning of words can almost never be "plain" except in a context. *Restatement, Second, Contracts* § 212, Comment b. That would include the history and purposes of the Act, the understanding of the parties, and the administration of the contracts. All are undisputed and support plaintiffs' interpretation.

[83] *Williston on Contracts* 3rd Ed. § 601 at p. 303. *United States v. Seckinger,* 397 U.S. 203, 208 (1970).

> . . . the court should give much less weight to what it thinks the party who used the words actually meant than to what it is convinced that the other party actually understood them to mean, provided that the first [party] knew or had reason to know that the second party did so understand them.

Here, HUD clearly knew that owners and lenders were relying on the "automatic" nature of the rent adjustment process.[84]

(b) Contracts should be interpreted to advance the party's principal purposes.[85] Here, the purpose of the formula rent adjustment process selected by HUD was clear. The purpose was to make rent adjustments simple and thereby induce owners to rely on the simplicity, uniformity and objectivity of the process.

The interpretation of plaintiffs is simple. It gives effect to the intention of the parties. The interpretation HUD proposes is not simple. It is uncertain, time-consuming and expensive. It is at least as complex as the rent adjustment system of the failed Section 236 program. Yet that is exactly where HUD would have the Section 8 program return, as demonstrated by the regulations HUD recently promulgated under Section 801. If an owner wishes to avoid harassment by "comparability," he can give up his contract right to "automatic"

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[84] In addition to the testimony of HUD officials cited earlier, and other evidence, a HUD Task Force in 1978 described the reliance of owners and lenders. In discussing proposed revisions to the formula rent adjustment process for future contracts the Task Force acknowledged that owners and lenders had relied on the process and that to change to a project-by-project rent analysis would be: "a disincentive to uninsured lending by conventional lenders and state agencies, who have been reassured by the present automatic rent adjustment process." See Appellees/Cross-Appellants' opening brief in *Rainier View,* p. 9 (copy lodged with Clerk).

[85] *Corbin On Contracts,* § 545, p. 160.

adjustments and return to the previously discredited Section 236 "budgeted rent increase method."[86]

(c) An interpretation that gives meaning to the entire Agreement is favored over one that makes some part of it mere surplusage.[87] Plaintiffs' interpretation makes sense of the entire contract. HUD's interpretation gives no weight to the words "automatic" or "shall" and totally disregards the protection afforded owners by the requirement of publication.[88]

(d) One economic function of contract law is to reduce the complexity and hence the cost of transactions.[89] Plaintiffs contracted for factors, published in the Federal Register, together with the basis for their determination, applied "automatically" and evenly to all projects in the area selected by HUD. The process was simple and involved no cost to the owner and minimal cost to HUD.

HUD's project-by-project comparability process is complex, time-consuming, and expensive. HUD must find and hire qualified appraisers at a cost of $1,000 to $3,000 per project appraisal.[90] The owner must hire an appraiser to challenge HUD's appraisal, and probably a

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[86] Fed. Reg. Oct. 29, 1992 at p. 49126.

[87] See *Farnsworth, Contracts* p. 516 (2nd Ed. 1990).

[88] This requirement does not guarantee that HUD will make good decisions. But by exposing those decisions, and their basis, to public scrutiny, the odds are that HUD will give more thought to its decisions. Moreover, those decisions can be more easily tested. For those reasons, some states, by constitution, provide for the publication of legal decisions. See Wash. Const. Art. 4, § 21. Lawyers above all should be sensitive to the importance of that process.

[89] See *R. Posner, Economic Analysis of Law* p. 69 (2nd Ed. 1977).

[90] See Council of State Housing Agencies Oct. 26, 1987 (copy lodged with Clerk). Moreover, the cost and complexity would be even more aggravated if either party could "trump" the factors. See n.106 *infra*.

lawyer to guide him through the process. Some appreciation for the costs involved can be had by reviewing the process described in Appendix A.[91]

(e) A court should avoid an interpretation which puts one party from being in a position of economic servility and completely at the mercy of the other.[92] HUD's interpretation would leave plaintiffs at the mercy of minor HUD officials. Owners and lenders had been assured that would not happen.

2. HUD'S Position

HUD started with only one argument to justify its rent cutting. The argument was at least straightforward and honest, although wrong. HUD simply claimed that the language of the overall limitation provision unambiguously allowed HUD "to make individualized rent adjustments after, and separately from, those calculated pursuant to a formula based on automatic adjustment factors."[93]

HUD claimed the court should defer to HUD's interpretation of its own contracts because HUD was a government agency. In other words, HUD's interpretation should prevail regardless of the context, the other provisions of the contract, the background and purposes of the Act, the original intention of the parties, HUD's own regulations, and ordinary rules of contract interpretation. For HUD, all of these matters were irrelevant.[94]

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[91] HUD argues that comparability will likely not be imposed on all owners. This is little solace to the owner who is selected for comparability and must go through the time-consuming and costly process. HUD hopes, of course, that owners will not challenge the process because of the enormous costs involved.

[92] See *Farnsworth, Contracts* p. 548 (2nd Ed. 1990).

[93] *Rainier View,* Appellees' Brief p. 1 (copy lodged with Clerk).

[94] Stripped of fictions and euphemisms, HUD's only argument is still that the overall limitation, read in a vacuum, supports HUD's posi-

The Ninth Circuit disagreed. Noting that HUD did not dispute any of the material facts presented by plaintiffs, the court ruled that the contract *unambiguously* required HUD to use the formula rent adjustment method. The court held that "the overall limitation provision, consistent with its statutory analog . . . is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments."[95]

Having lost with its honest argument, HUD manufactured new arguments, and invented facts, attempting to improve its position. The process has been continual, starting with HUD's petition for rehearing en banc in *Rainier View*.

HUD's petition for rehearing en banc moved away from the argument that the overall limitation authorized HUD to use a project-by-project market survey method *independently* of the formula method. As it does now, HUD argued for a "two-step process" beginning with a "general," "presumptive," "threshold" formula adjustment, with the project-by-project market survey method as a "cap" on the formula adjustment. This new fiction was invented by HUD's lawyers after the loss before the panel. The original argument at least was honest and recognized how the project-by-project method was actually being used. This new fiction implies that the project-by-project method is used merely to *limit* or "cap" the rent increase otherwise required by the formula. In fact, HUD used the project-by-project method to *lower* the rents which were in effect before the scheduled adjustment.[96] HUD's project-by-project method does not "cap" anything. *It*

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tion. In light of the undisputed record, this is the only position HUD can take.

[95] *Rainier View v. United States*, 848 F.2d at 991.

[96] The fiction is further exposed by Section 801, which recognizes that some owners did not dare to ask for formula rent adjustments for fear that their existing rents would be *cut*. Sec. 801(a)(1)(B).

nullifies not only the current formula adjustment, but also formula adjustments from prior years.

HUD's newly invented "two-step process" would make no sense even if HUD were not lowering rents. While at the same time HUD says the formula method and project-by-project method are complimentary, it also says that the project-by-project method "overrides" the formula method. As the en banc court understood, HUD's two-step process is really nothing more than a one-step process which selectively substitutes a project-by-project rent adjustment method for the formula rent adjustment method elected by HUD in the contract. If HUD's comparability studies were truly an auditing process to see if the formula was accurate, the results would be used to revise the formula, not to replace it with an entirely different system.

HUD next accused the Ninth Circuit of confusing two different "market survey" methods.[97] HUD said this confusion led the Ninth Circuit to incorrectly conclude that HUD's project-by-project method would nullify HUD's election of the formula method. This is a *non sequitur*. If a market survey method, of whatever kind, is used *instead of* the formula method, the market survey method obviously has the effect of nullifying the formula method.[98]

HUD also argued in its en banc petition, as it does here, that the formula method is not nullified because

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[97] The panel was not confused. It merely recognized that "changes in the fair market rentals in the housing area" constituted an alternative to the formula method under the statute, and that HUD's project-by-project method *could have* been elected pursuant to the first alternative. The fact that the statute permitted other market survey methods as well is irrelevant. The crucial fact is that HUD elected the formula method and not a market survey method or a combination of methods.

[98] HUD gets caught up in its own semantics. In effect, HUD admits that the factor method is nullified by saying the individual comparability method "overrides" the factor method (Pet. Brief p. 13). "Override" and "nullify" are synonymous. *Random House Thesaurus College Ed.* 1987, p. 487-88.

the formula is used if the project-by-project method produces a higher rent or if no individual market study is performed at all. Once again, HUD's argument does not follow. This case is not about owners who get their formula adjustments. It is about those who do not get their formula adjustments because HUD used a different method. *For them,* the formula method is certainly nullified.

HUD also argued in its en banc petition, and argues here, that the statute is silent on the manner in which it should exercise its mandate to keep Section 8 rents in line with market rents. HUD is correct. The statute is silent. The point is that when HUD elected a formula method by contract the silence ended.[99] The contract did determine how improper adjustments were to be avoided – by monitoring and adjusting the factors and geographical areas.

Finally, HUD argued in its en banc petition, and argues here, that the *Rainier View* decision "conflicts with the language and purpose of HUD's own regulation, ignores the agency's more relevant comparability rule, and contradicts the agency's long-held interpretation of its powers."[100] This argument denies reality: (a) HUD signed a stipulation in *Rainier View* that the factor adjustment method was the only rent adjustment method prior to 1981;[101] (b) prior to 1981, HUD's regulations and handbook interpreted the overall limitation to require factor adjustments for local variations,[102] and (c) HUD's reinterpretation of the overall limitation

[99] Deference to HUD's interpretation of its own *contracts* is not proper. See n.81 *supra* and text discussion.

[100] Pet. Brief p. 28.

[101] See Stipulation (copy lodged with Clerk).

[102] See discussion *supra* pp. 17-19.

in 1981 completely changed HUD's administration of Section 8 rent adjustments.[103]

3. Lower Court Decisions

HUD relies on a Claims Court decision, and two district court decisions which followed the Claims Court, as reasons for reversing *Rainier View.*[104] The principal problem is that these cases attempt to "interpret" the statute and contract in a vacuum, without knowing the background of the Section 8 program, without knowing the assurances given by HUD to induce the private sector to assume the risks of participation, and without knowing HUD's administration of the program before 1981. As a result, these decisions embark on a purely semantic exercise entirely divorced from the context in which the statute was enacted and the contracts were signed.[105] Under such unreal circumstances, HUD's fable proved effective.

Some of the major mistakes made by these decisions are:

- They deferred to HUD's interpretation of its own contracts.
- They ignored the background and purposes of the program.
- They ignored the original intention of the parties.
- They ignored HUD's own handbook, regulations and methodologies.

[103] HUD's "long-standing" interpretation (from 1974 to 1981) was the same as that of the *Rainier View* court and plaintiffs. HUD's deference argument, even if relevant, works against HUD. See n.81.

[104] Pet. Brief p. 16, n.11.

[105] A person can read the words of any contract and jump to the conclusion that they have but one reasonable meaning and that he knows what it is. But "a better understanding of the uncertainties of language and a study of cases in the field of interpretation, will make one beware of holding an opinion so recklessly arrived at." *Corbin on Contracts* § 535 p. 18.

- They ignored HUD's administration of the program from 1974 to 1981.
- They didn't have a clue as to what HUD was actually doing under the guise of comparability. They did not understand that HUD's so-called comparability studies were "farcical" and to use those studies to establish "windfalls" is just as farcical.
- They were under the misconception that Section 8 was a "market rent" program.
- They misunderstood how and why original rents were established.
- They thought it made no difference whether rents were adjusted by a formula method or a project-by-project comparability method.
- They, like HUD, dismissed the importance of publishing factors and the basis for arriving at factors when this was the owners' protection against abuse.
- They did not understand that instead of a windfall profit, owners have been going broke.

In summary, these lower court decisions relied on by HUD are wrong because they are based on HUD's fable.[106] Whose fault this is, is not important. What is important is that this Court base its decision on the undisputed record.

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[106] In a subsequent case, the Claims Court held that owners can also insist on individual comparability, despite HUD's argument that the proper remedy is to ask for factor adjustments. *See Park Village Apartments v. U.S.*, 25 Cl. Ct. 729 (1992). Under that decision the process goes from unwieldy to impossible, with each of the nation's 15,000 projects individually able to "trump" the factor adjustments. The "free-for-all" which would ensue demonstrates the unreasonableness of the Claims Court earlier decision.

4. Ratification By Congress

HUD claims Congress ratified HUD's interpretation of the statute in 1987.[107] HUD's argument might be relevant if this case turned on the interpretation of a statute. It does not. This case turns on the interpretation of a contract, a contract which was authorized by a statute. It is not "within the purview of Congress' power to engage in contract interpretation."[108]

B. Plaintiffs' Contract Rights Are Vested

To induce developers and lenders to invest in Section 8 housing, HUD inserted typical bond language into its contracts, solemnly pledging the full faith of the federal government. Owners and lenders relied on this guaranty when financing and building Section 8 projects.[109] In most cases, the contract was assigned to a lender as security for private financing, the terms of

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[107] Pet. Brief p. 22. What actually happened was that in 1987, because of HUD's "ad hoc and capricious" rent cuts, Congress amended the statute to disallow rent cutting. Congress said that it never intended for cuts to be made in the absence of the publication of negative factors (exactly plaintiffs' position). (See Appendix H). Congress repeated itself in 1988 because of HUD's "convoluted and tortuous" interpretation of the earlier law. Congress said: "Nothing could be more convoluted and tortuous than HUD's interpretation of the . . . 1987 Act, which resulted in a denial of the policy established by that Act." Public Law 100-628 (Nov. 7, 1988) (H. Rep. 100-741)

[108] Pet. for Cert. p. 11a. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 431 (1980) ("it is not the province of Congress to judge the persuasiveness of the opinions of federal courts.") *See also, United States v. Klein*, 13 Wall 128, 20 L.Ed. 519 (1871) (prescribing a rule of decision in a case pending before the courts in a manner that required the court to decide a controversy in the government's favor, held to be unconstitutional). *See also, Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) n.13 ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

[109] See Affidavit of Dean Chaussee, (J.A. 32).

which were approved by HUD.[110] Even Standard & Poors viewed the contracts as "rateable security" for bonds.[111]

HUD now argues its solemn contract obligations are meaningless. HUD claims "Congress has authority to legislate prospectively with respect to the administration of government contracts."[112] Such authority supposedly derives from the government's "sovereign power," which "is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[113] In other words, according to HUD, no government contract is worth the paper on which it is written.

HUD's argument is wrong. Congress of course can amend or repeal a statute at any time. It does not follow that existing contracts executed under authority of that statute can be so easily changed. The government's contracts cannot be changed, retroactively or prospectively, by a statutory change unless: (a) the contract so provides; or (b) the government exercises its war power, emergency police power, or other paramount power;[114] or (c) the "sovereign power" (also known as the "reserved power") doctrine is applicable. Here, the contracts do not provide the unilateral right of amendment. Nor has the government invoked its war power or emergency police power. Finally, the "reserved power"

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[110] See typical form of assignment as security (J.A. 70). The assignments were approved in writing by HUD (J.A. 7). See par. 2.11 of Exhibit B to Affidavit of Warren J. Daheim. See also 24 C.F.R. § 880.125(e) (Appendix E).

[111] Financing for Section 8, Journal of Housing, September 1977, p. 448.

[112] Pet. Brief p. 32.

[113] Pet. Brief p. 32.

[114] See *Larionoff v. United States*, 533 F.2d 1167, 1179 (D.C. Cir. 1976).

doctrine does not apply to "bargained for *contract rights* supported by independent consideration."[115]

To support its "reserved power" argument, HUD relies primarily on the case of *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986).[116] In *Bowen*, the state of California and several of its public agencies challenged Congress' attempt to deprive them of their contractual right to terminate their participation in the Social Security system. The Supreme Court rejected the state's due process argument since the statute on which plaintiffs' agreements were based expressly reserved the power of alteration, amendment, or repeal. In addition, the agreements

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[115] Pet. for Cert. p. 10a. That is not to say that Congress can make no changes in the Section 8 program which would be binding on owners under existing HAP contracts. The tenant's share of rent has been changed from 25% to 30% of his monthly income. Persons suffering from mental illness, AIDS, and alcoholism, are now eligible. Such changes impair the owner's contracts, but unlike Section 801 are not a frontal assault on HUD's financial obligations under the contracts. The distinction is discussed in *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 24-25 (1977) ("not every security provision, however, is necessarily financial").

[116] HUD also cites *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), *Federal Housing Admin. v. The Darlington Inc.*, 358 U.S. 84 (1958), *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and the *Sinking-Fund Cases*, 99 U.S. 700 (1879). *Merrion*, *Darlington*, and *General Motors* are cases in which the court declined to interpret contracts as containing implied provisions foreclosing the exercise of sovereign power. In none of those cases was the claim based on an explicit contractual provision, as it is here. *Sperry* does not involve the government's own contracts, and is clearly inapplicable. In the *Sinking-Fund Cases*, the government amended the charters of federally chartered railroad corporations under an express power of amendment reserved in the charters. It required railroads, as quasi-public entities, to set aside reserves to meet bond obligations. The government did not renege on a financial obligation to the railroads.

were not ones for which the state paid value and therefore were subject to an implied "reserved power" to amend.[117]

The Court in *Bowen* carefully restricted the "reserved power" doctrine to contracts involving benefits gratuitously conferred. The court clearly distinguished cases like *Lynch v. United States*, 292 U.S. 571 (1934) (an attempt to cancel insurance contracts between the federal government and private parties) and *Perry v. United States*, 294 U.S. 330 (1935) (an attempt to modify the provisions of government bonds). The court pointed out that those cases involved contracts supported by independent consideration.

Bowen bears no resemblance to the facts of this case. Neither the Section 8 statute, nor the HAP contracts, contain a power of amendment. A HAP contract is between HUD and a private party. Unlike *Bowen*, valuable consideration was given by the lenders and owners when they agreed to finance and build costly housing units for the poor in exchange for HUD's promise of a formula rent adjustment process free from bureaucratic whim.

In summary, there is a doctrine of reserved powers. However, "when a [sovereign] impairs the obligations of its own contract, the Reserved Powers Doctrine has a different basis." *United States Trust Company of New York v. State of New Jersey*, 431 U.S. 1, 23 (1977). "Whatever the propriety of a [sovereign] binding itself to a future course of conduct in other contexts, the power to enter into *effective* financial contracts cannot be questioned." *Id.*, 431 U.S. at 23-24 (emphasis added). As the Court said in *United States Trust Co.*:

> A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity. *Id.* 431 U.S. at 25, n.23.

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[117] The termination clause was not one "for which the state provided independent consideration." *Bowen* at p. 55.

In the present case, a financial obligation of the sovereign is involved. It would be an "absurdity" if the sovereign pledged its full faith and credit to honor that obligation while retaining the unilateral right to "deny or change the effect of" its promise. Under that reasoning, even treasury notes would be worthless.

C. Section 801 Substantially Impairs A Vested Contract Right

Not every impairment of a vested contract right is unconstitutional. The impairment must be substantial.[118]

In the trial court, plaintiffs submitted affidavits from a number of owners to establish both the retroactive and prospective impact of Section 801.[119] HUD has never before challenged the fact that Section 801 had a substantial impact on plaintiffs.[120] HUD's Petition for a Writ of Certiorari boldly asserts the decision of this

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[118] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 27 (1977); *National R.R. Passenger Corp. v. Atchison, T.&S.F.R.R.*, 470 U.S. 451, 472 (1985). In *United States Trust Co. v. New Jersey*, a lengthy trial was held at which both parties presented witnesses and other evidence on the impact of a change which affected the security for bonds issued by a public port authority.

[119] Attached to Aff. of Warren J. Daheim (R.18) (see excerpts Appendix J).

[120] See discussion pp. 2-3 *supra*. The fact is undisputed that owners would not have signed contracts and lenders would not have loaned money against those contracts if Section 801 had been in existence. See Aff. of Chaussee (J.A. 25-35); Declaration of Goldrich (J.A. 36-43); and letters of owners attached to Aff. of Warren J. Daheim (R. 18). That is the central issue in cases dealing with the impact of legislation on existing contracts. *See El Paso v. Simmons*, 379 U.S. 497, 514 (1965) ("The promise of reinstatement . . . was not the central undertaking of the seller nor the primary consideration for the buyer's undertakings"); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) ("They have taken from the mortgage the quality of an acceptable investment for a rational investor").

Court is "of great programmatic importance,"[121] affecting over 15,000 contracts nationwide, and involving 50 million dollars in the Ninth Circuit and over one billion dollars nationwide.[122]

HUD now claims that the impact of Section 801 is "minimal,"[123] and that owners retain the "lion's share"[124] of rent and the "core economic features of their bargain."[125] HUD even says that Section 801 puts the owners in a "better financial position."[126]

Not only are HUD's arguments made too late, but they are specious. They are based on the fiction that what HUD calls "comparability" was a study of rent movement by qualified appraisers using proper appraisal techniques.[127] This fiction is refuted by the undisputed record.

1. Retroactive Impact

> "At the Crystal Palace Aquarium not long ago, I saw a crab euthanatising a sickly fish, doubtless from the highest motives."
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> 46 The Spectator 241 (1873)

HUD has the temerity to say that Section 801 puts owners "in a better financial position than their contracts guaranteed."[128] But plaintiffs' contracts guaranteed

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121 Pet. for Cert. p. 22.

122 Pet. for Cert. p. 23.

123 Pet. Brief p. 35. This Court does not decide questions not raised in the lower court. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

124 Pet. Brief p. 29, n.26.

125 Pet. Brief p. 43.

126 Pet. Brief p. 30

127 In addition, HUD dismisses the importance of publication, which is the owner's shield against arbitrary actions. See n.88 *supra*.

128 Ibid.

full factor adjustments. Section 801 gives owners only 30% of what they are due under their contracts.[129]

HUD's argument is that its capricious studies were valid and that HUD's only error was in not converting the results of those studies into published factors. HUD argues that since under Section 801 the affected owners will get 30% more than they would have gotten if HUD's studies had been "folded"[130] into factors, the owners are receiving a windfall.

HUD's argument is dishonest and is contradicted by the undisputed record. The example shown in Appendix A is illustrative. HUD compared a seven story elevatored Section 8 apartment located in the heart of downtown Tacoma with wood frame walk up apartments located on the edge of town. Not only was the comparison "farcical,"[131] it did not even purport to measure the *movement* of rents. Instead of studying how much rents had moved in the wood frame apartments over a period of time and applying that percentage to the Section 8 rents, HUD compared the two projects and arbitrarily concluded that the Section 8 rents were too high. HUD then cut those rents from $487 per month to $354, notwithstanding the fact rents for the wood frame apartments had actually increased over the previous year.

HUD's comparison cannot be "folded" into factors because it was not a measurement of rent movement in the market. In short, the premise of HUD's argument is as "farcical" as the studies on which the argument was based. HUD's suggestion that the *Rainer View* court could simply have remanded to the agency[132] for adjustment of factors based on studies which did not measure market movement and violated elementary standards

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129 See n.72 *supra*.

130 Pet. Brief, p. 34, n.33.

131 Appendix A.

132 Pet. Brief p. 31, n.28.

of procedural due process (see n.21 *supra*) is preposterous.

2. Prospective Impact

Section 801 authorized HUD to establish modified annual adjustment factors (MAAFs) for geographic areas smaller than those covered by the AAAFs. Those factors are to be based on comparability studies measuring the movement of market rents.[133]. *Rainier View* held that HUD already had this authority.[134]

Section 801 also authorizes HUD to apply "an alternative methodology for conducting comparability studies" in the event MAAFs cannot be established.[135]

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[133] HUD argues (n.32) that the statute "also responds to owners' complaints about HUD's methodology." That is false. HUD confuses the methodology for modified annual adjustment factors, provided for in Section 801, with the methodology for doing project-by-project comparability. The owners' complaints were that project-by-project comparability did not measure market movement and the results were not published. Section 801 responds to neither complaint.

[134] Since the legislation was drafted by HUD, it shows how ignorant HUD's national office is of its own regulations and procedures. Since 1977 HUD field offices have been authorized and *directed* to establish modified annual adjustment factors for geographic areas smaller than those covered by the AAAFs. See discussion, pp. 18-19, *supra*.

[135] HUD claims (n.30) that it would be "prohibitively expensive to collect highly localized CPI data or to survey areas not covered by CPI data to determine comparable rents." Yet HUD already establishes FMRs each year for approximately 2,750 areas (Fed. Reg. October 29, 1992, p. 49122). All HUD would have to do is measure the percentage change in FMRs from one year to the next to establish AAAFs. In addition, HUD has instructed owners that they can avoid individualized comparability under Section 801 by changing their contracts to go back to the discredited Section 236 budgeted method of annual rent adjustment. Fed. Reg. October 29, 1992, p. 49126. That procedure would entail individual processing for 15,000 projects, if all owners succumbed to HUD's threat. How that is simpler than spot checking on market movement and publishing modified factors is a mystery (the latter is the system suggested by HUD counsel by opinion letter of Aug. 28, 1980) (see Appellees/Cross-Appellants' opening brief in *Rainer View* p. 24) (copy lodged with Clerk).

This provision is intended to authorize HUD to adjust rents based on the type of comparability studies condemned in *Rainier View*.[136] These studies recompare projects instead of measuring the movement of rents. The results, and their basis, are unpublished and closely guarded.

Plaintiffs commenced their action challenging the constitutionality of Section 801 on its face [137] as violative of their contract rights to published factor rent adjustments. If Section 801 stands, Congress will have unilaterally amended plaintiffs' contracts to permit the unpublished, individualized recomparing of rents as a substitute for the published factor method measuring market movement. It is an understatement to say that this change is substantial.

HUD responds by arguing: (a) that rent adjustment procedures can never be protected by the Fifth Amendment; and (b) the impact of the "alternate methodology" is "minimal" since theoretically individual comparability will produce the same results as the factors. HUD is wrong on both counts.

In support of its first argument, HUD relies on *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).[138] In that case, a utility challenged a change in the State's rate making methodology. No contract was involved. The court simply held that "no single rate making

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[136] "The committee did not share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies." Cong.Rec. 16600 (Nov. 21, 1989).

[137] In the trial court, HUD claimed that the prospective application of Section 801 was not "ripe" because regulations had not been issued. HUD lost on that issue and did not appeal it to the Ninth Circuit. The issue is raised here by HUD, but is buried in a footnote (n.33). The issue should not be considered. If it is, the Court is referred to the trial court's decision for discussion of the issue (Pet. Cert. p. 18a). Space limitations prohibit further discussion.

[138] *See also, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). (A federal law limiting tort claims was held constitutional.)

methodology is mandated by the Constitution."[139] Plaintiffs agree. However, the methodology of rent adjustments in this case is mandated by plaintiffs' contracts. Changing the methodology substantially changes the contract, which is a violation of the Constitution.

HUD's second argument is again dishonest. HUD argues that the impact of Section 801 is minimal since comparability theoretically could produce the same result as the factor method.[140] This argument relies on the hope that the reader will be unable to understand the difference in the two concepts.

Since the two concepts are not attempting to do the same thing, the results will never be the same. The factor method attempts to keep initial contact rents parallel and proportionate to the movement of rents in the local market. As explained earlier,[141] HUD's version of comparability aims to remeasure and defeat the initial relationship of contract rents to the market. One is a principled and objective attempt to keep contract rents even with rental inflation in the area. The other is an attempt to save money by a subjective reanalysis of the rents originally agreed upon.[142]

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[139] 488 U.S. 299, 317.

[140] See Pet. Brief p. 35, n.34 (No substantial impact because the net economic outcome is the same).

[141] See pp. 19-21 *supra*.

[142] HUD argues (n.15) that the contract provision protecting the "initial difference" protects against this result. If the initial difference was viewed as establishing a relationship to the market, HUD's argument might make some sense. But HUD now claims that the initial difference is to be measured in original dollars. (Fed. Reg. Oct. 29, 1992, p. 49125). This is itself an admission that HUD is undermining the initial difference because it denies an inflation adjustment for those dollars. In any event, the recomparing of projects does undo the original agreement on rents by analyzing and revaluing the individual features of each project.

D. The Purpose of Section 801 Is To Save Money

Where the legislature passes a law impairing its own contracts, a "careful examination of . . . [its] motive and purpose is required."[143] There is a "strong bias" against such legislation.[144] Deference to a legislative assessment of reasonableness and necessity is not appropriate because the [government's] self-interest is at stake.[145] This Court is not barred by the government's self-serving declarations,[146] but is "under solemn duty . . . to look at the substance of things whenever it enters upon the inquiry whether the legislature has transcended the limits of its authority."[147]

The purpose of Section 801 is obvious. It was proposed by HUD to "fix" the *Rainer View* case. As Secretary Kemp stated, its purpose "is to minimize HUD's liability under the Ninth Circuit's *Rainier View* ruling."[148] A review of comments by sponsors of the Bill confirms that purpose.[149] As Senator Sasser, Chairman of the Budget Committee stated:

> I would like to . . . clarify the intent of the legislation with respect to Section 801 . . .
>
> [B]y moving quickly to enact this legislation with its *Rainier View* "fix," we could save the

---

[143] *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 245 (1978). HUD concedes the application of this more rigorous standard of review. (Pet. Brief pp. 35-36). However, HUD goes on to argue on the basis of the "arbitrary and irrational" standard appropriate for private contracts.

[144] *Nowak on Constitutional Law* (1983), p. 477.

[145] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412, n.14 (1983). As the court said, "In almost every case, the Supreme Court has held a governmental unit to its contractual obligations when it enters financial or other markets."

[146] *Larinoff v. United States*, 533 F.2d 1167, 1180 (D.C. Cir. 1976).

[147] *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

[148] See letter of Secretary Kemp, Cong. Rec. H9688 (Nov. 21, 1989).

[149] See excerpts from Cong. Rec. (Appendix I).

> Government hundreds of millions, if not more than a billion dollars.[150]

Realizing that the impairment of contracts "to save money" is unconstitutional,[151] HUD offered a number of other justifications to the trial courts, all of which were found to be "illusory."[152] Having failed a reality check in the lower courts, HUD now limits its rationales and cleverly rephrases them. As rephrased to this Court, HUD's rationale is that:

> Section 801 constitutes an intricate adjustment of the payment provisions in a comprehensively regulated low-income housing program. The statute eliminates the unforeseen obstacle that *Rainer View* had put in the way of Congress' original policy and restores uniformity to the program's operation.[153]

HUD's rationale is classic double-talk. Section 801 does not constitute "an intricate adjustment of the payment provisions in a comprehensively regulated low income housing program." It emasculates a critical provision of a bargained for agreement for which plaintiffs paid valuable consideration. The statute does not "eliminate the unforeseen obstacle that *Rainer View* had put in the way of Congress' original policy." By "fixing" *Rainier View*, it attempts to overrule a judicial

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150 Ibid.

151 See e.g. *Lynch v. United States*, 292 U.S. 571, 580 (1934); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Bowen v. Public Agencies Opposed to Social Security Employment*, 477 U.S. 41, 55 (1986).

152 Pet. for Cert. p. 59a.

153 Pet. Brief p. 45. HUD bounces around and sometimes seems to suggest other rationales. However, the rationale quoted appears to be the one on which HUD has finally decided to light. The reader is referred to the lower court opinions which discuss various other HUD rationales. Pet. for Cert. p. 15a-30a, 40a-60a.

interpretation of a contract.[154] Section 801 does not "restore uniformity to the program's operation," because it authorizes the capriciousness of project-by-project comparability. Uniformity could be achieved by HUD simply living up to its contracts. As the *Acacia* trial court said: "The government cannot justify application of the studies on the ground that it seeks to apply them more equitably where the government had no right to apply them at all."[155]

To penetrate HUD's double-talk, a useful divining rod should be the "duck test."[156] HUD asked for the legislation to save money.[157] Congress said that it passed the legislation to save money.[158] The direct

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154 HUD also attempts to cast Section 801 as "curative" legislation. Of course, unliquidated claims, not based on contract, can be resolved by Congress. The cases cited by HUD support that proposition, but nothing more. *See General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992) (court found that there was no contractual right to the benefits claimed); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (statute requiring payment to U.S. of percentage of awards made by Iran-United States Tribunal – to pay for costs of Tribunal; did not involve the government's own contracts); *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989) (retroactive application of Act precluding anti-trust damages permitted as to unliquidated claims; did not involve vested contract rights); *Graham, Foster, v. Goodcell*, 282 U.S. 409 (1931) (a defect in the administration of the Internal Revenue Code can be cured by retroactive legislation; did not involve vested contract rights).

155 Pet. Cert. p. 59a. HUD also argues based on takings cases that the legislation is constitutional since Congress did not completely abrogate its contract (Pet. Brief p. 43). But that argument was dealt with under the "substantial impairment" section. Under that reasoning, the government could eliminate interest on treasury notes since the principal would still be payable.

156 If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck.

157 See letter of Secretary Kemp, Cong. Rec. H 9688 (Nov. 21, 1989) ("The practical effect of this agreement is to minimize HUD's liability under the Ninth Circuit's *Rainier View* ruling . . . ").

158 See Appendix I.

effect of the legislation is to save money. Obviously, the purpose was to save money.

CONCLUSION

Constitutional principle, and enlightened public interest, require that the government keep its promises when it enters the commercial world. As the Chairman of the House Subcommittee on Housing said of HUD in 1984:[159]

> If the Department persists, there will be no reason for any contractor to place any faith in the word of the government . . .
>
> Section 801 is unconstitutional.

Respectfully submitted,

WARREN J. DAHEIM
DONALD W. HANFORD

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[159] Hearing, House Subcommittee Housing, Feb. 1984, No. 98-71.

APPENDIX INDEX

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APPENDIX A

JUDGE ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAINIER VIEW ASSOCIATES, a Washington limited partnership, and KURTIS R. MAYER and PAMELA MAYER, d/b/a MAYER BUILT HOMES, Plaintiffs, vs. UNITED STATES OF AMERICA, acting through the United States Dept. of Housing and Urban Development, and the HOUSING AUTHORITY OF THE CITY OF BREMERTON, Defendants.	NO. C 83-997R AFFIDAVIT OF DONALD W. HANFORD IN SUPPORT OF PLAINTIFFS' MOTION FOR SUPPLEMENTARY RELIEF

STATE OF WASHINGTON)
: ss.
County of Pierce)

DONALD W. HANFORD being first duly sworn on oath deposes and says:

1. Affiant is an attorney who has represented various Section 8 owners in connection with efforts by HUD to cut rents based on comparability analysis performed by HUD. Affiant is competent to

testify to the matters stated herein, and the same are stated on his personal knowledge.

2. Affiant represented Tacoma Partnership ("Owner"), the Owner of the 1400 Market Section 8 elderly project ("Project") in Tacoma, Washington, with respect to HUD's determination that the contract rents be reduced from $487 per month to $354 per month. The Project is a 7-story elevator building with 125 units. The rent decrease amounts to $199,500 per year.

3. A notice of appeal was filed with HUD requesting a hearing on the record, before an impartial hearing officer, and with the right to examine HUD personnel. The hearing officer was a HUD official who refused to permit the questioning of HUD personnel. The "hearing" was limited to the Owner's presentation of facts pertinent to a comparability analysis.

4. Owner hired Core Beamster, market research director and appraiser with Shorett & Riley, Seattle, Washington, to examine what materials were available involving the methodology used by HUD to conduct its comparability analysis. Mr. Beamster was also asked to perform his own comparability analysis according to conventional appraisal techniques.

5. The pictures on the next page are of the Project and one of the "comparables" selected by HUD.

SECTION 8 APARTMENTS

HUD'S "COMPARABLE"

6. Mr. Beamster concluded that the comparables used by HUD, which were personally inspected by Mr. Beamster, and the apparent methodology used by HUD for making adjustments to account for the additional amenities of the Project (i.e. location, view, elevators, interior corridors, age, condition, recreational areas, construction design, square footage etc.), were "farcical" and a "perfunctory exercise" that did not "fairly represent an honest methodology."

7. The analysis prepared by Mr. Beamster according to conventional appraisal techniques, using other high-rise apartments in Tacoma, Washington, as comparables, indicated that the current contract rents were squarely within the rental range that would be expected in the Tacoma market. The adjusted rents determined by HUD were substantially below the market.

/s/ Donald W. Hanford

SUBSCRIBED AND SWORN TO before me this 6th day of March, 1987.

Seal

/s/ Janet L. Hill
Notary Public in and for
the State of Washington,
residing at Tacoma.
My commission expires
5-22-90

APPENDIX B

SECTION 8(c)(2) OF THE UNITED STATES HOUSING ACT OF 1937 (as originally adopted)

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as herein before provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

APPENDIX C

SECTION 8 CONTRACT RENT ADJUSTMENT PROVISIONS (Typical)

1.9 RENT ADJUSTMENTS

a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Session 1.6a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulate rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

APPENDIX D

24 C.F.R. 888

Subpart B–Contract Rent Automatic Annual Adjustment Factors

AUTHORITY: Sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)); sec. 5(b), U.S. Housing Act of 1937 (42 U.S.C. 1437c(b)); sec. 8, (U.S. Housing Act of 1937 (42 U.S.C. 1437(f))

§ 888.201 Purpose.

Automatic Annual Adjustment Factors are used to adjust rents under the Section 8 Housing Assistance Payments Program.

[44 FR 75383, Dec. 20, 1979]

§ 888.202 Measure of publication.

Adjustment Factors will be published in the FEDERAL REGISTER at least annually by Notice. Interim revisions may be published as market conditions indicate. In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors (see § 888.204).

[42 FR 60508, Nov. 25, 1977, as amended at 44 FR 75383, Dec. 20, 1979; 47 FR 4252, Jan. 29, 1982]

§ 888.203 Use of contract rent automatic annual adjustment factors.

(a) To compute an adjustment to a Contract Rent, find the schedule of Automatic Annual Adjustment Factors for the appropriate Census Region or Standard Metropolitan Statistical Area –

(1) If the Contract Rent includes all utilities, use the factor shown on the basic schedule for the rent bracket within which the particular Contract Rent falls and for the applicable size of unit (by number of bedrooms).

(2) If the Contract Rent does not include all utilities but does include the highest cost utility, use the appropriate factor shown on the basic schedule.

(3) If the Contract Rent does not include any utilities or includes some utilities but not the highest cost utility, use the Annual Adjustment Factor for Contract Rent (Excluding Utilities).

(b) The adjusted monthly amount of the Contract Rent of a dwelling unit shall be determined by multiplying the Contract Rent in Effect on the anniversary date of the contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount.

[42 FR 60508, Nov. 25, 1977, as amended at 44 FR 21769, Apr. 12, 1979; 47 FR 4252, Jan. 29, 1982]

§ 888.204 Revision to the automatic annual adjustment factors.

If the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act of 1937, in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate

than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area. Any request for revision of the factors must be accompanied by an identification of the area, its boundaries and evidence that the area constitutes the largest contiguous area in which substantially the same rent levels prevail. The HUD Field Office will publish appropriate notice of the establishment of any such revised Automatic Annual Adjustment Factors. These factors will remain in effect until superseded by the subsequent publication of Automatic Annual Adjustment Factors pursuant to § 888.202.

[44 FR 21769, Apr. 12, 1979]

APPENDIX E

24 C.F.R. § 880.102 (April 29, 1975)

* * * *

Fair Market Rent.(a) The rent, including utilities (except telephone), ranges and refrigerators, parking, and all maintenance, management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design meeting the objectives of the HUD Minimum Property Standards.

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24 C.F.R. § 880.103 (April 29, 1975)

(a) New construction projects shall be permitted only where: (1) HUD determines that there is not and there is not likely soon to be an adequate supply of existing housing which, with the aid of housing assistance payments provided under the Section 8 Housing Assistance Payments Program – Existing Housing, can meet the needs of Eligible Families, or (2) the proposed project is specifically approved by HUD in accordance with priorities established from time to time by the Secretary including priorities for New Communities.

* * * *

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24 C.F.R. § 880.108 (April 29, 1975)

* * * *

(b) *Reasonableness of Rents.* In any case, the Contract Rents as proposed must be determined by HUD to be reasonable in relation to the quality, location, amenities, and management and maintenance services of the project, and proposed rents shall be subject to reduction if they are found to be higher than such reasonable rents. Appropriate reductions to reflect any savings where tax-exempt financing is involved may be made.

---

24 C.F.R. § 880.110(b) and (d) (April 29, 1975)

* * * *

(b) *Automatic Annual Adjustments.* (1) Automatic Annual Adjustment Factors will be determined by HUD at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by HUD where utilities are paid directly by Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by HUD. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the

adjusted rents be less than the Contract Rents on the effective date of the Contract.

* * * *

(d) *Overall Limitation.* Notwithstanding any other provisions of this part, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable unassisted unites, as determined by HUD.

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24 C.F.R. § 880.125(e) (April 29, 1975)

* * * *

(e) *Use of Contract as security for financing.* (1) An Owner or financing agency pledge, or offer as security for any loan or obligation, an Agreement or Contract entered into pursuant to this part, and a financing agency may pledge ACC payments as security for housing assistance payments pursuant to the Contract: *Provided, however,* That such security is in connection with a project constructed pursuant to this part, the terms of the financing or any refinancing have been approved by HUD in accordance with this section, and the financing agency has submitted a certification that the terms and conditions of the financing of the particular project are consistent with those specified in the documents which were approved by HUD. Any such pledge shall be limited to the amounts payable under the Contract or ACC in accordance with its terms.

(2) In the event of foreclosure, or assignment or sale to the financing agency in lieu of foreclosure, or in the event of assignment or sale agreed to by the financing agency, and approved by HUD (which approval shall not be unreasonably delayed or withheld), housing assistance payments shall continue in accordance with the terms of the Contract.

APPENDIX F

FED. REG. NOVEMBER 8, 1976 p. 49440

* * * *

These factors were calculated for 23 Standard Metropolitan Statistical Areas (SMSAs) and for the four Census Regions on the basis of changes in the Consumer Price Index (CPI) for rents and utilities that occurred in the last year. *Because of the unavailability of CPI data for all housing market areas, the Department is requesting comments from members of the general public on alternate approaches or data sources which could provide information on smaller sized areas than those being published at this time. Such comments may relate to national or regional data, to methodology, or to limited areas.* (Italics added).

FED. REG. NOVEMBER 25, 1977 p. 60508

* * * *

2. Section 888.202 is being revised to state that additional Adjustment Factors will be published where market conditions indicate a need to publish factors for particular areas.

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24 C.F.R. § 888.202

(as revised November 25, 1977 – revisions italicized)

Schedule C Adjustment Factors will be published in the Federal Register at least annually. Interim revisions may be published as market conditions indicate. *In the case of revised factors applicable only to specific areas, the HUD Field Office will publish a notice appropriate to the limited scope of the revised factors (see Section 888.204).* (Italics added.)

HUD HANDBOOK (MAY 1978)

* * * *

Pursuant to Section 880.110(d), the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither to high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3).

APPENDIX G

HUD HANDBOOK PROVISION (7420.1CHG)

*7-8 ANNUAL AND SPECIAL ADJUSTMENTS TO CONTRACT RENTS AND ADJUSTMENTS TO UTILITY ALLOWANCES.

a. *Automatic Annual Adjustments.*

(1) In accordance with Section 880.110, Automatic Annual Adjustment Factors will be determined by HUD and published in the *Federal Register* at least annually with interim revisions made as conditions warrant. Annual revisions to Contract Rents will be based on the Automatic Annual Adjustment Factors, subject to the overall limitation that Adjustments shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the AHM Branch (*except to the extent that differences may have existed with respect to the initial Contract Rents*), to cover increases incurred since the effective date of the Contract. *Contract Rents shall be adjusted on the anniversary date of each Contract by applying the Automatic Annual Adjustment Factors most recently published by HUD.* For projects with staged completion, the anniversary date for the first stage shall be deemed the anniversary date for all the stages for the purpose of the annual adjustment. The Factors are found in Schedule C of Part 888. In order to undertake this responsibility, the AHM Branch shall maintain the most recent Schedule C. The Area

Counsel shall prepare an amended exhibit to the Contract to reflect changes in the Contract Rents.

(2) The Owner shall submit the revised rent schedule on Forms HUD-52670 and HUD-52670A, based on the application of the Automatic Annual Adjustment Factors, no later than the 20th of the month prior to the anniversary date of the Contract. The revised schedule shall be submitted simultaneously to the AHM Branch and to RAD in the case of a Private-Owner or PHA-Owner Project, and to the PHA in the case of a Private-Owner/PHA Project.

(3) *In accordance with Section 888.203, to compute an adjustment to a Contract Rent, the schedule of Automatic Annual Adjustment Factors for the appropriate Census Region or SMSA is used.* Section 888.203 provides specific instructions on the application of the factors to specific units with or without utilities. The following example assumes a Contract Rent of $200 for a two-bedroom unit in Springfield, Massachusetts (Northeast Census Region):

(a) When the Contract Rent includes *all* utilities, use the *basic schedule:*

$200 x 1.064 = $213

(b) When the Contract Rent does not include all utilities but does include the highest cost utility, use the *basic schedule:*

$200 x 1.064 = $213

(c) When the Contract Rent includes (a) some utilities but not the highest cost or (b) no utilities, use the Annual Adjustment Factor, Excluding Utilities:

$200 x 1.052 = $211

NOTE: All computations shall be rounded to the next higher dollar amount. For example, $209.01 is rounded to $210.

The new Contract Rent for each unit eligible for the adjustment shall be placed on Form HUD-52670A, Part I, Column (5). Accordingly, the new Housing Assistance Payment for each unit receiving the Automatic Annual Adjustment shall be computed by subtracting the Rent Payable by Family, column (6), from the newly-computed Contract Rent, Column (5), and inserting the new Housing Assistance Payment in Column (7).

(4) The AHM Branch (or the PHA in a Private-Owner/PHA Project) shall establish an effective control to ascertain the anniversary date of each Contract. If the Owner submits the Forms HUD-52670 and 52670A, Part 1, with changes reflected by the application of the adjustment factor, the AHM Branch or the PHA shall verify the accuracy of the amounts by referring to Schedule C. Pursuant to Section 880.110(d), *the AHM Branch or the PHA shall review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the*

AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8 c (2) and (3). In Private-Owner/PHA projects, the PHA shall be responsible for notifying the AHM Branch of the need to revise the factors. If the anniversary date passes without the Owner reflecting the changes, the AHM Branch or the PHA shall make the appropriate computations and notify the Owner and RAD and, as appropriate, retroactive payments to the Owner may be requested by the Owner and paid.

* * *

APPENDIX H

100TH CONGRESS) HOUSE OF (REPORT
1st Session) REPRESENTATIVES (100-122

HOUSING, COMMUNITY DEVELOPMENT, AND HOMELESSNESS PREVENTION ACT OF 1987

JUNE 2, 1987.–COMMITTED TO THE COMMITTEE OF THE WHOLE HOUSE ON THE STATE OF THE UNION AND ORDERED TO BE PRINTED

MR. ST GERMAIN, from the Committee on Banking, Finance and Urban Affairs, submitted the following

REPORT

together with

MINORITY, SUPPLEMENTAL, AND ADDITIONAL VIEWS

[To accompany H.R. 4]

The Committee on Banking, Finance and Urban Affairs, to whom was referred to the bill (H.R. 4) to amend and extend certain laws relating to housing, community and neighborhood development and preservation, and shelter assistance for the homeless and displaced, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * *

Section 8 rent adjustments

When it enacted the Sec. 8 program, Congress intended that rents for project-based assisted projects would be reduced only if the published Automatic Annual Adjustment Factor ("AAAF") was negative; reflecting a noticeable general downturn of rents in the market area. Although no negative adjustment factors have been published to date, HUD field offices have been making capricious individualized rent reductions nonetheless. Further, such reductions and other rent limitations have been made on an ad hoc and arbitrary basis in the absence of published procedures that could assure a consistent policy. To eliminate these arbitrary practices not justified under current law, Sec. 142(d) prohibits reductions in rents in effect on or after April 15, 1987, unless the project has been refinanced and the monthly mortgage payments have been reduced.

* * *

APPENDIX I

EXCERPTS FROM CONGRESSIONAL RECORD

Senator Sasser (Chairman Budget Committee):

Mr. President, I would like to enter into a colloquy with the chairman of the Subcommittee on Housing and Urban Affairs to *clarify the intent of the legislation* with respect to Section 801, "annual adjustment factors for Section 8 rent."

At the outset, I would like to offer my congratulations to the chairman for addressing the very complex situation surrounding the *Rainier View* decision. Indeed, by moving quickly to enact this legislation with its *Rainier View* "fix" we could save the Government hundreds of millions, if not more than a billion dollars.

-Cong. Rec. S 16607 (Nov. 21, 1989).

Senator Cranston (Chairman Housing Subcommittee):

The Administration placed the cost of compliance with the Court of Appeals' decision at $600 million to $1 billion. The Administration estimates that the cost of this retroactive solution is $210 million nationwide.

-Cong. Rec. S 16600 (Nov. 21, 1989).

Senator D'Amato (Ranking Minority Member, Housing Subcommittee and Co-sponsor of Bill):

The provision in this bill reduced this loss to $210 million – a savings of over $390 million.

-Cong. Rec. S 16602 (Nov. 21, 1989).

Representative Gonzalez (Chairman Housing Subcommittee):

The resolution would reduce retroactive costs to $210 million and reduce prospective costs to $500 million over 10 years.

-Cong. Rec. H 9686 (Nov. 21, 1989).

Representative Wylie (Ranking Minority Member, Housing Subcommittee):

These issues include a provision regarding the methodology for HUD to use in determining Section 8 project rent adjustments made necessary by the Rainer View court decision . . . It too will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million.

-Cong. Rec. H 9690 (Nov. 21, 1989).

Secretary Kemp (in letter to Congress):

Although the final bill does impose a greater retroactive settlement cost than I had proposed, it does provide the essential legislative relief to avoid a potential loss of $2 billion at a cost of less than $250 million.

-Cong. Rec. H 9688 (Nov. 21, 1989).

APPENDIX J

EXCERPTS FROM OWNERS' LETTERS

From An Owner In Seattle, Washington:

"In early March of 1975 I attended an in-depth briefing of the Section 8 program at NAHB headquarters in Washington, D.C. This briefing was jointly sponsored by NAHB and HUD.

"Larry Simons, then FHA Commissioner and Deputy HUD Secretary for Housing, presented the view from HUD.

"He presented the Section 8 program as a program completely devoid of the problems of the failed Section 236 program in that HUD would have the private sector develop, own and manage conventionally financed projects with HUD supplying tenant subsidy by way of a project contract. The key factor to be considered, according to Simons, was that HUD would not interfere with the project income but would make *automatic* annual adjustments to the rental rate. The automatic adjustment would be based on a published factor for selected geographic areas.

"For several years HUD lived up to their part of the Section 8 contract: did not interfere and adjusted rental rates in accordance with published AAAF's. In 1981, I believe, the tinkering started with AAAF's and HUD's attempt to limit AAAF's to application to operating costs only. This was the first step to HUD creating a 236 monster out of a good Section 8 program.

"In retrospect, the developer/builders who committed the excellent sites to house low income elderly (whose sin is being poor) and who honored

the Section 8 contracts on a long range basis are the fools of Section 8 program."

From An Owner In Tacoma, Washington:

"The economic impact of this new law on me, as a Section 8 owner, is the same as the economic impact that we have endured throughout most of the life of this program with regard to the projects that I own. We built these projects in 1980. We spent a portion of 1978, all of 1979, all of 1980 and through 1981, getting our projects planned, built, and rented up. This represents a significant period of time in a person's economic life. We made the decision to spend the time on these projects, because HUD represented to us that this program was to be a program which was a mirror of the market for conventional units. In other words, we would be able to enjoy the same rent increases throughout the life of this project as we would if we were building a conventional project. Also, we assumed then that we would be able to enjoy the same increases in value of our projects throughout the term of the HAP Contract. This has not been the case, and if this new law is allowed to take effect, will continue to not be the case.

"I've had it with this program and with HUD in general. If I had done business with any private individual who made the representations to me about any private program, in order to induce me to participate in the program, I would have been able to sue that individual for fraud and prevail, causing him to either buy the project or pay substantial damages, compensating me for the time and the lost economic opportunities that I missed

as a result of spending time creating these projects."

"When the Section 8 Program was introduced, HUD officials represented that this program was the program that was going to end all of the frustrating, bureaucratic machinations that we had to go through under the 236 Program. Our rent increases were to be automatic. They were to be tied to the consumer price index and to be an absolute mirror of the conventional apartment market. This was simply not true.

"These programs have been every bit as frustrating as the old Section 236 Programs. I don't know of any of my acquaintances who are involved in a Section 8 Program, who would have signed up for these contracts and built these projects, had they been told of the way in which they would be treated throughout this program. The Department of Housing and Urban Development lured us into these programs with misrepresentations as to how they would be administered. If any contract between two private parties had been breached, in the way that our Section 8 contracts have been breached, the party in default would have been required by the courts to pay damages long ago. I don't understand why HUD seems to be able to operate without regard to the laws of our land and get away with it."

From An Owner In Dubuque, Iowa:

"Our costs of building St. Mary's Apts. were 140% higher than conventional construction due to the Federally mandated requirement to build under the Davis-Bacon Law. However, over a

period of time, these increased costs were expected to be retrieved through adjusted annual rents. The change in the law and the direction that HUD is taking definitely nullifies my expectations of recouping the tremendous added costs of construction under the Davis-Bacon Law. The revised law will reduce our annual income on a continuous basis. . . . The future viability of this type of property is certainly on the line. Further, with diminishing return, we have less ability to refinance the project now or in the future."

From An Owner In Ames, Iowa:

"Changing the requirements that HUD agreed to follow substantially effects the marketability and profitability of these projects. Obviously a reduction of anticipated income grossly effects the market value of each project. Due to past experience with HUD, we now have no confidence in what to expect for rental rates in the future. . . . This uncertainty over rental rates makes the Section 8 projects a poor investment and greatly reduces their market value."

From An Owner In Everett, Washington:

"Our development company has little interest in participating with HUD again in providing low income housing and this lack of interest is shared by many other developers and owners. HUD has proven its inability to provide and maintain low income housing without private sector involvement. In fact, HUD's history for the last eight years has been that the only housing they can build is mansions with swimming pools and

jacuzzis for consultants with the proper political connections."

From An Owner In June Lake, California:

"Without the rent increases we have virtually no cash flow. Without some positive cash flow, we have an unsalable project."

From A Property Manager In Seattle:

"The impact of this proposed law will make it difficult for our buildings to carry themselves. Real estate taxes and other expenses are going up every year. Without a 5 to 6% increase in rents, I don't see how they could keep pace with the increased expenses. This new law would put Section 8 owners at a disadvantage. We are finally getting to a position where there is a return on our original investments.

"All in all we feel that if the new law goes into effect our buildings will suffer greatly and not be able to meet their expenses."

From A Property Owner In Minnesota:

"It seems to me . . . that HUD struck a bargain and drew a contract with private owners into which neither party knew what the eventual outcome would be. When it appears that using comparability would save money, even though it was never part of the original contract, HUD saw fit to change the rules both unilaterally and arbitrarily. When challenged, HUD characterized fulfillment of the contract as 'windfall.'

"There are times that we as citizens need to point out the hypocrisy of your stance. When contract law is not honored by our government, then carried to an extreme position, we need to act as Eastern Europeans finally did in their countries.

"I wonder what stance HUD would take if the Automatic Adjustment would have been less costly and the private owners had argued for comparability studies."

No. 92-551

MAR 1 7 1993

In the Supreme Court of the United States

OCTOBER TERM, 1992

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Cases—Continued: Page

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2 American Institute of Real Estate Appraisers, *Condemnation Appraisal Practice* (1973) 10-11
Appraisal Institute, *The Appraisal of Real Estate* (10th ed. 1992) 11
135 Cong. Rec. (daily ed. Nov. 21, 1989):
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p. S16,600 17
p. S16,602 17
p. S16,608 17
41 Fed. Reg. 49,440 (1976) 8
57 Fed. Reg. 49,126 (1992) 16
H.R. Rep. No. 1114, 93d Cong., 2d Sess. (1974) 7, 8

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1970 HUD Handbook (May 1978) 9, 10
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In the Supreme Court of the United States

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No. 92-551

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents' constitutional attack on Section 801 of the HUD Reform Act rests on three claims: that respondents have contractual immunity from the use of comparability studies applied as separate caps to rental adjustments in the Section 8 program; that Section 801 substantially impairs that right; and that Congress's action violates the Due Process Clause because the legislature acted solely to save money. The first claim cannot be reconciled with the language of the contracts, construed in light of the regulatory program that authorized them. The second claim cannot be reconciled with the actual effect of Section 801 on the contracts, even as respondents construe them. And the third claim misunderstands the reasons prompting Congress's action and the governing legal standards. This Court should reject respondents' claim that they have a perpetual right to automatic rent ad-

justments in excess of those at comparable unassisted properties and should affirm the constitutionality of Section 801.

A. *The Assistance Contracts.* Respondents argue that, pursuant to their Assistance Contracts, HUD may not apply separate comparability caps to factor-based adjustments. Alpine Br. 26-37; Acacia Br. 20-31. That contention conflicts with the contract's terms, *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281, 283 (4th Cir. 1984) ("[a]n unambiguous document controls"), cert. denied, 472 U.S. 1008 (1985); *Devine* v. *Ladd Petroleum Corp.*, 743 F.2d 745, 748 (10th Cir. 1984); *Edmonds* v. *United States*, 642 F.2d 877, 881 (1st Cir. 1981); the principle that a contract that parallels a statute must be interpreted in light of the agency's interpretation of the statute, *United States* v. *City of Fulton*, 475 U.S. 657, 672 (1986); and the purposes and background of the Section 8 program.

1. The basic obstacle to respondents' approach is the language of the contracts. To implement its statutory mandate, see 42 U.S.C. 1437f(c)(2) (1982), HUD drafted the Assistance Contracts to provide that (A) rents were to be adjusted annually through factors determined by HUD; (B) special additional adjustments were to be granted when required to reflect general increases in actual and necessary operating expenses not covered by the factor-based adjustment; and (C) as an "overall limitation,"

> Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *.[1]

[1] Assistance Contract, § 1.9. The "overall limitation" provision goes on to state that "this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed

Alpine argues that the "overall limitation" is simply a guide to how the factor-based adjustment must be computed by HUD. Alpine Br. 15. The overall limitation, however, is not written as a direction to HUD about what factors to select for purposes of adjustments under § 1.9b of the contract; rather, the limitation is a separate economic constraint on rental adjustments and supersedes any conflicting application of other provisions. The structure of the contract makes that clear. It provides for two methods of adjustment (annual and special), each governed by separate criteria,[2] and subjects both to an overarching financial limitation of comparability. HUD *must* implement that limitation through an inquiry into "the rents charged for assisted and comparable unassisted units," and having made such a determination, HUD must then avoid any adjustment that would produce "material differences."[3] § 1.9d. Alpine's reading converts the

with respect to the initial Contract Rents." § 1.9d. Alpine asserts (Br. 13) that the contract "guaranteed that that relationship [of initial rent to market rent] would be preserved." The contract, however, does not refer to a "relationship," but to an "initial difference"—the dollar difference between comparable property rents and the rents authorized in the initial contract. HUD's system for applying comparability studies protected the initial difference. See Gov't Br. 18 n.15 (describing a "material difference"); Gov't Reply Br. in Support of Pet. for Cert. 5 & n.5.

[2] The components of the factor-based adjustments are to "be determined by the Government" and "the basis for their determination published in the Federal Register." § 1.9b(1). The "special additional adjustments" are to be "demonstrate[d]" by the owner and must respond to "substantial general increases in real property taxes, utility rates, or similar costs." § 1.9c.

[3] The "overall limitation" clause clearly applies as a separate and independent cap on special operating expense adjustments computed under § 1.9c, and there is no reason to construe the same clause differently with respect to factor-based adjustments computed under § 1.9b.

"overall limitation" into a subordinate guideline for composing the factors.[4]

Acacia asserts that the "overall limitation" does not provide HUD with authority to restrict factor-based adjustments through comparability studies, because the "overall limitation" governs adjustments "as provided in this Section" (*i.e.*, factor-based adjustments) and does not provide an independent process for adjusting rents. Acacia Br. 17. HUD, however, did not use comparability studies as an independent process for initiating adjustments, but used the studies to make an inquiry into "the rents charged for assisted and comparable unassisted units" for purposes of applying the overall limitation. HUD's approach allowed the "overall limitation" to play the role that the contract assigned to it: it acted as the final step of the process of applying adjustments to ensure that they would not result in a "material difference."

2. Our opening brief demonstrates that the Secretary's construction of the Housing Act to permit comparability caps is entitled to deference. Gov't Br. 20-22. Respondents argue that no deference should be given to the Secretary's interpretation of the Housing Act and the implementing Assistance Contracts because deference is irrelevant in a contract case. Alpine Br. 28 n.81; Acacia Br. 24-25. Yet, as Alpine recognizes, "HUD's statutory mandate to keep Section 8 rents in line with market rents * * * was incorporated into plaintiffs' contracts * * *." Alpine Br. 24. Acacia similarly acknowledges (Br. 4)

[4] Alpine suggests (Br. 30) that the contract's characterization of the annual adjustment as "automatic" would be nullified under HUD's view of the "overall limitation" provision. The use of the word "automatic," however, meant only that the owner did not have to request the adjustment; when the program shifted to requiring an owner to request an adjustment, the Assistance Contract was revised to delete use of the word "automatic." See Post-1980 Assistance Contract, § 2.7(b)(1) ("Upon request from the Owner to the CA, Contract Rents will be adjusted on the anniversary date of the Contract * * *"), *reproduced at* Gov't Br. App. 9a.

that the "overall limitation provision * * * echoes th[e] statutory command" of 42 U.S.C. 1437f(c)(2)(C)." The Secretary's interpretation of the statute is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and because the Assistance Contracts incorporate the statutory requirements, the Secretary's interpretation of the statute is directly relevant in construing the contracts.

The relevance of the Secretary's interpretation is illustrated by *United States* v. *City of Fulton*, *supra*. There, the Court considered whether, under applicable statutes and contracts between the government and other parties, an agency could permit interim rates for hydroelectric power to go into effect pending further federal review of those rates. The Court first concluded that the agency's view that the statute permitted interim rates to be effective was entitled to deference under *Chevron*, *supra*, 475 U.S. at 666-668. The Court then turned to the issue of whether the contract the government had entered into permitted interim rates. The Court held that the contract language, which "track[ed] that of the statute," should be read in the same way, explaining that "[i]f the Government had meant by that contractual language to bind itself with restrictions going beyond those contained in the statute, we believe that such restrictions would have been set out more explicitly." *Id.* at 672.

The same analysis applies in this case. The Housing Act charges HUD with the responsibility to avoid rent adjustments that would result in material differences be-

[5] The Ninth Circuit similarly recognized that the issue of whether comparability studies are permissible is "contract related," but "rests at bottom on statutory or regulatory rights." Pet. for Cert. App. at 50a, *United States* v. *Rainier View Assocs.*, No. 88-1515 (Oct. Term 1988). See also *Rainier View Assocs.* v. *HUD*, 848 F.2d 988, 991 (9th Cir. 1988) (interpreting contractual "overall limitation" provision "consistent with its statutory analog, Section 8(c)(2)(C)"), cert. denied, 490 U.S. 1066 (1989).

tween assisted and comparable unassisted projects, and a longstanding HUD regulation reflects the agency's interpretation that the comparability rule is an "overall limitation." 24 C.F.R. 880.609(c); see Gov't Br. 27-28. HUD's interpretation of that regulation to authorize project-specific comparability caps is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), and the interpretation was ultimately ratified by Congress. Gov't Br. 22. HUD did not contract away its authority to use comparability caps when it inserted the "overall limitation" provision in the Assistance Contracts; to the contrary, that provision clearly expresses the comparability requirement. Accordingly, the Assistance Contracts should be given a parallel reading to HUD's reading of the underlying statute and regulations: factor-based increases may be "capped" by comparability studies when those increases would exceed rent levels in the unassisted market.[6]

3. Respondents rely on a variety of background materials in support of their claim that HUD construed the "overall limitation" clause as something other than a separate cap. Alpine Br. 8-19; Acacia Br. 2-6, 29-31.

[6] The contract interpretation principles invoked by respondents are inapplicable in this case; they assume that the contract language is ambiguous and ignore HUD's role in administering the counterpart statutory requirements. Alpine Br. 27-31; Acacia Br. 24, 30-31. For example, the principle that a contract should be construed "less favorably to that party which selected the contractual language" (Alpine Br. 28; Acacia Br. 24) applies only if the contract is "ambiguous" and each of the alternative readings is both "reasonable and practical." *United States* v. *Seckinger*, 397 U.S. 203, 211, 216 (1970). In this case, the contract is not ambiguous, and respondents' interpretation would produce unreasonable and impractical results that would defeat HUD's ability to avoid excessive increases. See Gov't Br. 21-22.

Those materials have no legal relevance[7] and, in any event, respondents' account of the program is factually flawed.[8]

Congress did not design the Section 8 program, as Alpine argues (Br. 9), solely to achieve a "simple" method of adjusting rents. Rather, Congress's intention was to establish rent-adjustment procedures that protect owners against increases in operating costs, but that prevent above-market rental increases that would encourage inefficient management.[9] In explaining the Section 8 pro-

[7] The contracts' integration clause (Gov't Br. 23 n.19) establishes that respondents' impressions about how HUD would administer the contracts are not legally relevant. Moreover, the language of the contracts, in light of the regulatory background, is sufficient to reveal the contracts' meaning. Isolated statements of HUD officials (see Alpine Br. 9, 16) cannot establish otherwise.

[8] Respondents contend that the affidavits they submitted in district court conclusively established the expectations of owners and the actions of HUD. Acacia Br. 2-4; Alpine Br. 3 n.8. We disagree. There was no need for the courts below to address those factual issues, as they decided the case solely based on *Rainier View*'s prior reading of the contracts. And the "anecdotal evidence" cited by respondents is not sufficient to support their sweeping claims about the background or operation of a nationwide program. Cf. *Department of Labor* v. *Triplett*, 494 U.S. 715, 723 (1990).

[9] "[A] housing owner whose operating cost increases are out of line with increases in comparable projects providing similar facilities and services in the area may not increase rents and would have to either absorb the operating cost increase or, preferably, take effective remedial action with respect to its management problems." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 22 (1974); see Gov't Br. 20 n.18. Alpine asserts (Br. 9) that the Section 8 program was designed to rectify the problems of the prior Section 236 program and that any project-by-project adjustment would be inconsistent with that goal. The problem, however, that Congress identified in rent adjustments in the Section 236 program was that "the amount of the subsidy is fixed for forty years." H.R. Rep. No. 1114, *supra*, at 21. The response was the process created by Section 8(c)(2) of the Housing Act: a provision for general and specialized rent increases (to reflect increased operating costs), coupled with a com-

gram to owners (see Gov't Br. 23-24); in promulgating regulations (see 24 C.F.R. 880.609(c)); and in implementing the program,[10] HUD has consistently adhered to those twin goals.

In the early years of the program, HUD did not apply separate comparability caps, but the agency acknowledged its authority to do so. The first year that Adjustment Factors were published was 1976. J.A. 49; 41 Fed. Reg. 49,440 (1976). In 1978, a HUD Task Force Report (cited at Alpine Br. 29 n.84) described HUD's current policy as including both factor-based adjustments and comparability checks:

> The current statutory and regulatory rent adjustment policies allow some flexibility in determining the specific adjustment. The regulations repeat the statutory provision that Section 8 rents charged shall not be materially different for assisted and comparable unassisted units. *This policy permits Field Offices to adjust contract rents upward or downward based on a comparability analysis.*[11]

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parability restriction (to protect HUD against "higher costs resulting from inefficient management practices"). H.R. Rep. No. 1114, *supra*, at 22.

[10] Comparability determinations were made in establishing the initial rents, because HUD applied an alternative "rent reasonableness" test to initial rents based on comparability studies. See 24 C.F.R. 880.204(b)(1)(ii) (allowing owners to exceed comparable rents by no more than 20% and then only where the excess was cost justified); J.A. 48 n.1 (Declaration of James J. Tahash); Gov't Br. 25 n.22; Acacia Br. 2 n.2, 8-9, 25 n.17. Alpine's claim that initial rents were set solely by a negotiation process (Br. 9-11) ignores the applicable regulations. Because the manner of establishing initial rents entailed comparability studies, owners were on notice that implementation of the similarly worded "overall limitation" provision would entail comparability studies as well.

[11] HUD Task Force, *Section 8 Task Force Paper No. 2: Revisions to the Section 8 Rent Adjustment Policy* 2 (1978) (emphasis added). (We have lodged copies of the Task Force Report with

Respondents err in relying (Alpine Br. 18-19; Acacia Br. 5-6) on a HUD handbook. The 1978 HUD Handbook repeated the "overall limitation" requirement and required HUD field offices to "review the accuracy of the rent adjustment to ensure that it is comparable (neither too high or too low) in relation to similar assisted or unassisted units." HUD Handbook, § 7-8.a(1), (4) (May 1978) [7420.1.CHG], *reproduced at* Alpine C.A. Br. Addendum 8. Although the Handbook required revision of the Adjustment Factors in response to a comparability study, it did not suggest that HUD was precluded from applying another method to reflect the results of comparability studies. And by 1980, HUD officials had affirmed the agency's authority to use comparability studies as separate caps.[12]

The fact that HUD, briefly and at the beginning of the program, did not exercise its power to apply comparability caps does not divest it of the legal right to do so. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950); *Beck Park Apartments* v. *HUD*, 695 F.2d 366, 371 (9th Cir. 1982). Nor does HUD's early practice suggest that owners expected complete immunity from comparability caps. The owners' expectations were best stated

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the Clerk of this Court.) The Task Force Report further noted that "[a]lso the regulations were revised last November 1977 to permit Field Offices to revise the AAAF based on documentation by the owner that rents for comparable units have increased at a faster rate than allowable under the published factors." *Ibid.* The regulation in question is 24 C.F.R. 888.204. The Ninth Circuit read that regulation as the exclusive means for addressing comparability, see *Rainier View*, 848 F.2d at 991, but the Task Force Report makes clear that it was an alternative method for applying comparability studies.

[12] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 65-68 (1984) [1984 House Hearings] (reproducing HUD memorandum, Aug. 28, 1980).

in the 1984 testimony of a leading industry representative:

> At the start of the program, * * * HUD made much of the "automatic annual adjustment" for rents, *with the only limitation being that Section 8 rents could not exceed comparable unassisted rents.* Developers thus knew that although the risk of loss was upon them, there was also the potential for profit, if they could obtain tenants and operate the project efficiently.[13]

4. Throughout their briefs, respondents claim that HUD administered comparability studies erratically, arbitrarily, and inaccurately. Acacia Br. 8-11, 26; Alpine Br. 20-21, 43. That is not the issue in this case. The agency's implementation of comparability studies does not resolve the question of whether the contract permitted an independent comparability cap. And, although HUD's conduct of comparability studies in the 1980s lacked national standards and produced some inconsistencies and erroneous results, we disagree with the broad claim that all of the comparability studies were necessarily inaccurate in measuring rents.[14]

Comparability studies of rents, properly administered, are similar to the standard appraisal technique used to value other types of property: [15] the studies examine rents

[13] 1984 House Hearings, *supra*, at 27 (prepared testimony of Charles L. Edson, on behalf of National Leased Housing Association) (emphasis added); see also Gov't Br. 24.

[14] Acacia argues (Br. 7) that if HUD's comparability studies were actually producing market rents, "the owners of Section 8 projects would not now be in dire financial straits." See also Alpine Br. 6. The Section 8 program, however, always entailed the "risk of loss." See text accompanying note 13, *supra*. In times of recession, it is hardly surprising that a marketplace cap on rents has put financial pressure on Section 8 owners. The pressures that exist, however, are being felt in the unassisted market as well.

[15] "Perhaps the best evidence of market value is market *data*, often referred to as "*comparable sales*." 2 American Institute of Real Estate Appraisers, *Condemnation Appraisal Practice* 84 (1973).

at similar properties and adjust for differences at the Section 8 project.[16] Such ground-level comparisons are the natural way to determine whether the general and broad-based Adjustment Factors are achieving their aim.[17] And the Assistance Contracts expressly provide that if the Adjustment Factors have materially overshot the mark in a particular case, the comparability determination prevails, "[n]otwithstanding any other provisions of this Contract." § 1.9d. Respondents' claim that they were promised automatic rental adjustments, whether or not materially in excess of the comparability standard, is untenable. Respondents' remaining claims accordingly fail, for lack of that essential premise.

B. *Absence of Substantial Impairment.* Even on respondents' view of the contracts, Section 801 is not a sub-

[16] This is a well-accepted method. "The rents of comparable properties can provide a basis for estimating market rent for a subject property once they have been reduced to a unit basis equivalent to the unit applied to the subject property. * * * If an appraiser uses proper judgment in making adjustments, a reasonably clear pattern of market rents should emerge." Appraisal Institute, *The Appraisal of Real Estate* 436-437 (10th ed. 1992).

[17] Respondents never explain how else HUD could determine whether rent adjustments would "result in material differences between the rents charged for assisted and comparable unassisted units." § 1.9d. That contract provision necessarily "envisions HUD making some type of market study of comparable rents * * * [and] [t]he most direct and accurate way for HUD to determine 'rents charged . . . for comparable units' would be to conduct some form of a survey of market rents charged for comparable units." *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649, 659 (1991), appeal pending, No. 92-5064 (Fed. Cir.); *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 689 (W.D. Pa. 1992) ("the court itself cannot imagine[] how HUD could know whether there is any material difference in rents * * * unless someone undertakes to determine what the rents are at the comparable unassisted units"), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.).

stantial impairment of their rights. Gov't Br. 29-35. Acacia concedes (Br. 12) the essential point: "Under the Ninth Circuit's analysis, HUD could rely on 'comparability studies' as a way of satisfying itself that the AAAF adjustments fall into the proper range * * *." If that is true, then Section 801 preserves, not impairs, the core economic expectation of the owners: that owners would receive rent adjustments that fall within the range of comparable project rents. See *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (a law that "restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment").[18]

Respondents argue that, because the government would be liable to make a significant payment to owners if Section 801 is struck down, the law necessarily works a substantial impairment. Acacia Br. 26-37; Alpine Br. 41-46. The proper test for determining whether the law works a substantial impairment of their *contract* rights, however, requires a comparison of the owners' position under Section 801 to the owners' reasonable expectations if HUD had implemented their contracts in accordance with the *Rainier View* reading. See *El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965) (no substantial impairment of contracts despite significant economic savings to the State). *Rainier View* did not hold that the owners have an unqualified right to Adjustment Factor increases, regardless of whether those increases materially departed from market rents.

[18] Respondents argue that this Court may not consider the issue of substantial impairment because HUD did not specifically raise it in the courts below. Alpine Br. 2, 25. HUD, however, defended the constitutionality of Section 801, and "[o]nce a federal claim is properly presented, a party can make any argument [in this Court] in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532 (1992). Moreover, where a private party is asking this Court to invalidate an Act of Congress on constitutional grounds, it is particularly important for this Court to address and resolve the relevant legal issues.

Under *Rainier View*, if HUD determined that "application of the formula would result in a disparity between section 8 and other rents," it must revise the formula "to keep assisted rents in line with market rents." 848 F.2d at 991. In the years in question, HUD did not revise the formula, because it believed that it could (more efficiently) achieve the same financial result by applying a comparability cap to specific projects. In consequence, however, the full-factor adjustments that respondents seek were never properly calibrated to their submarkets, although HUD found that their application would result in excessive rents. Section 801 remedies the agency's failure.[19]

1. *Retroactive provisions.* Respondents argue that nothing less than application of the full HUD Adjustment Factors to past years would satisfy their reasonable contract-based expectations. Accordingly, they assert that Section 801 is a substantial impairment because it requires use of a different factor.[20] Alpine Br. 42-44. That claim, however, assumes that owners had a reasonable expectation of receiving the particular Adjustment Factors that HUD published, and that their contracts prohibited congressional alteration of HUD's formulas. Neither claim is correct.

First, the contract did not guarantee any set level or specific amount of rent adjustments; the only substantive

[19] Alpine argues (Br. 42-44) that HUD could not have used comparability studies even to modify the factors. In so arguing, Alpine goes further than the Ninth Circuit, which stated that HUD was permitted to modify the formula "whenever application of the formula would result in a disparity between section 8 and other rents." *Rainier View*, 848 F.2d at 991.

[20] Section 801(a) requires factor-based adjustments that (a) apply to the contract rent, net of the cost of debt service, and (b) guarantee the owners a minimum of 30% of the HUD full-factor adjustment. Gov't Br. 9.

standard is that adjustments shall not result in material differences from the unassisted market. As we have noted, because HUD did not anticipate the *Rainier View* reading of the contracts, it did not modify the published Adjustment Factors to reflect comparability limitations for all owners. And, with respect to the class of owners covered by Section 801, Congress had reason to believe that the Adjustment Factors were not working properly.[21]

Second, Congress has always had the power to supersede HUD's definition of the Adjustment Factors in order to achieve the statutory goals. Neither the contract nor the statute specifies the components of "Automatic Annual Adjustment Factors" or the methods for applying them to contract rents. What Congress did in Section 801 was simply to make a determination of what constituted a "reasonable formula" for a particular class of owners. 42 U.S.C. 1437f(c)(2)(C). Its decision to do so did not violate any legitimate contract-based expectations.[22]

2. *Prospective provisions.* Respondents argue that Section 801's procedural modifications for the future impair

[21] The Section 801(a) formula applies to the class of owners whose adjustments were directly or indirectly limited by comparability studies. HUD, in turn, conducted comparability studies when it had reason to believe that the rent adjustments under the Adjustment Factors might be excessive. Gov't Br. 6, 18, 29-31; J.A. 47. Whether the comparability studies were accurate in every case is not at issue (see Acacia Br. 36), because the retroactive provisions do not set rents based on the comparability studies.

[22] The Section 801(a) formula provides annual rent *increases* on the portion of the contract rent used to cover general operating costs. That is a reasonable approach, particularly because it would have been impracticable to have applied the *Rainier View* approach to individual owners with respect to past years dating back to 1981; a general rule to cover the class of owners was necessary. Gov't Br. 29-31. "The fact that men will differ in opinion as to the adequacy of any particular yardstick of value emphasizes that the appropriateness of any one formula is peculiarly a matter for legislative determination." *Gelfert* v. *National City Bank*, 313 U.S. 221, 234 (1941).

substantial rights. Acacia Br. 12-13; Alpine Br. 44-46. We disagree.

Alpine asserts (Br. 46) that any possible future use of comparability studies would cause financial harm to owners, because the studies seek to erase the "initial difference" and necessarily defeat the objective of the Adjustment Factors: to compensate for the movement in market rents. That argument fails for two reasons. First, HUD has always protected the initial difference when it applied comparability caps, because the initial difference is considered in determining whether rents are *materially* different. See note 1, *supra*. Second, the Adjustment Factors themselves would be inaccurate if they produced rents materially in excess of local market rents. Section 801(c) recognizes that, where efforts to modify the factors cannot practicably achieve the statutory mandate of comparability, another method of adjustment is warranted.

Acacia asserts (Br. 12-13) that any future use of comparability studies would be substantially less accurate than the Adjustment Factors, which are published and must meet standards of statistical reliability. The Adjustment Factors, however, rely exclusively on broad "market surveys" of housing costs, J.A. 50-51 (declaration of David E. Shenk, Director of HUD Division of Economic Market Analysis), and cannot guarantee local accuracy in all cases (Gov't Br. 17)—which is precisely why HUD allows owners to seek an increased localized factor based on rent levels at "comparable [unassisted] units." 24 C.F.R. 888.204. Properly conducted comparability studies are likely to be more accurate on a local level than the general Adjustment Factors. And there is no reason to doubt that future comparability studies, carried out under HUD regulations, will produce reliable results.[23] The use of the comparability process, in short,

[23] In response to complaints about past comparability studies, HUD's proposed rule mandates standards for selecting comparable

does not significantly disadvantage owners; it simply implements the contract's standard of materially comparable rents.

C. *Due Process Review of Section 801.* Respondents argue that because Section 801 affects the government's financial obligations, it violates the Due Process Clause. There is, however, no rule of law that renders contracts with the government, alone of all forms of property interests, totally immune from legislative change. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977) ("The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations."). It is particularly inappropriate to foreclose, under the Due Process Clause, the regulation of rents at federally subsidized low-income housing projects. Even if we assume, therefore, that Section 801 works a sufficiently substantial impairment of contracts to warrant further due process inquiry, respondents have not demonstrated that Congress's action is unconstitutional.

1. Respondents contend that Congress enacted Section 801 simply to save money and that it is therefore invalid under *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Acacia Br. 40-46; Alpine Br. 47-50. Respondents' analysis of Congress's purposes is incorrect.

Legislators, of course, did state that one purpose of Section 801 was to avoid windfalls resulting from *Rainier View*.[24] But that was not its only purpose. The provi-

unassisted properties; states that "[c]omparability studies will be conducted by appraisers under industry-approved appraisal standards"; and provides for administrative appeals. 57 Fed. Reg. 49,126 (1992) (proposed rule 24 C.F.R. 888.503(c)). A comparability study must also satisfy requirements of administrative reasonableness and "is reviewable under administrative law principles." *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738, 745 n.3 (D. Colo. 1991).

[24] As this Court has recognized, however, the avoidance of windfalls is not equivalent to the illegitimate repudiation of a debt, which the Court addressed in *Lynch*. "One legitimate state interest is the elimination of unforeseen windfall profits." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).

sion establishes uniform criteria for HUD to administer, and implements Congress's original purpose that Section 8 rents shall not be materially different from open market rents. As a co-sponsor of Section 801 stated, Section 801 "is designed to promote nationwide uniformity in the manner in which HUD implements the comparability limitation * * * in making rent adjustments using the annual adjustment factors for section 8 projects." 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (Sen. D'Amato); *id.* at S16,608. In recognition that "a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents," *id.* at S16,600 (section-by-section analysis), Congress directed HUD to promulgate regulations providing alternative means to determine whether the factors were achieving comparable rents.

Respondents argue that Congress could not reform the Section 8 program in that manner (Acacia Br. 45-46, 49), but was required to acquiesce in the *Rainier View* decision. Congress, however, was not obligated to elevate what it perceived to be one court's incorrect holding (and bad public policy) into the law of the land, simply because that would achieve uniform national administration of its low-income housing program. It was entirely reasonable for Congress to respond as it did—by restoring the market-oriented premise of the program (see note 9, *supra*) and by correcting what was perceived as "maladministration" by HUD officials. 135 Cong. Rec. S16,594 (daily ed. Nov. 21, 1989) (Sen. Cranston).

2. Acacia argues (Br. 46-48) that, even if Congress's purpose was to restore uniformity and appropriate procedures in the Section 8 program, that purpose cannot sustain Section 801 under the Due Process Clause. Accord-

ing to Acacia (Br. 47), some form of "stricter scrutiny under the due process clause" applies to contracts to which the federal government is a party, and Section 801 fails such scrutiny.

In our view, when federal legislation has the effect of modifying rights under a private party's contract with the government, the heightened form of review that applies to state legislation that impairs state financial contracts does not apply. Gov't Br. 36 & n.35. Even if that Contract Clause standard[25] were applicable here, however, Section 801 satisfies it. Section 801 reasonably accords with the expectations of Section 8 project owners that rents would not materially exceed rents at comparable unassisted projects. Moreover, Congress's retrospective revision of the adjustment formula and its limited provision for future alternative methods (including comparability studies) were necessary means to that end.

Alpine does not address the issue of what standards govern the due process inquiry. Instead, Alpine relies on the claim that it has "vested" contract rights and that those rights are immutable.[26] Alpine Br. 37-41, 47-50. But elsewhere Alpine concedes that Congress can (and has) made statutory changes that "impair the owner's contracts" and agrees that those changes are "binding on owners under existing HAP contracts." Alpine Br. 39 n.115 (noting changes in tenant's rental share and tenant

[25] A law that impairs the State's financial contracts must be both "reasonable and necessary to serve an important purpose" to survive Contract Clause scrutiny. *United States Trust Co.* v. *New Jersey*, 431 U.S. at 25 n.25.

[26] The notion of "vested rights" does not resolve the constitutional inquiry. As this Court has observed, "[w]e understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase is not one found in the language of the Constitution." *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885).

eligibility requirements). Alpine provides no persuasive reason why those changes, which have a financial impact, are permissible, while the present changes, which further important public purposes in the expenditure of federal funds on subsidized housing, are not.

This Court's decision in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), is instructive, notwithstanding that respondents have developed and operated Section 8 projects under contract with the government. Alpine Br. 39-41; Acacia Br. 33-34. While respondents have given consideration, respondents also benefit considerably from participating in the program: respondents receive the infusion of federal funds, and the terms of the contracts insulate the owners from many market risks. Gov't Br. 29 n.26. And, as in *POSSE*, the contracts at issue track statutory requirements; the non-federal parties had no bargaining power over the relevant terms; and the impairing legislation affects a "comprehensive social welfare program." 477 U.S. at 53; see Gov't Br. 32-33. In light of the public interests at stake in the provision of subsidized low-income housing, Congress retained authority to amend Section 8 to ensure that public expenditures served the program's objectives. Section 801's provision of a revised rent-adjustment procedure for achieving the program's pre-existing goals is a legitimate exercise of that power.[27] Cf. *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252-253 (1987). Accordingly, Section 801 does not violate the owners' due process rights.

* * * * *

[27] Congress did not repudiate its core obligation to pay rent subsidies, to adjust them for inflation, or to compensate owners for reasonable increases in operating expenses. Thus, Congress did not undermine its pledge of the government's credit. Acacia Br. 32-33; Alpine Br. 37. Nor, for the same reasons, is this case analogous to respondents' hypothetical in which Congress eliminates all interest on Treasury notes. Alpine Br. 49 n.155.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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No. 92-551

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Petitioners,
v.
ALPINE RIDGE GROUP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have granted their consent to the filing of said brief. Respondents have refused their consent. In support of this motion, the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women.

2. The AFL-CIO, its affiliates, and their members have a strong interest in the standards governing Due Process Clause and Contract challenges to regulatory legislation. *See, e.g., General Motors Corp. v. Romein*, 112 S.Ct. 1105 (1992) (ruling on employer challenge to a curative legislative modification to a state workers compensation law based on the legislation's alleged impairment of employer-employee contracts).

3. The attached brief *amicus curiae* sets forth the constitutional analysis that, in the view of the AFL-CIO, should apply in this case if this Court were to conclude that *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), properly interprets the contracts at issue here. That analysis emphasizes the distinction between legislation that affects purely private contracts and legislation that affects contracts between the Government and a private party, a distinction not emphasized in the jurisdictional papers.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the American Federation of Labor and Congress of Industrial Organizations in this case is set forth in the foregoing motion for leave to file this brief.

SUMMARY OF ARGUMENT

1. It is our position that the Government's interpretation of the housing assistance payment contracts ("HAP contracts") at issue in this case is the proper interpretation, and we submit that the Court should embrace that interpretation and decide the due process

issue presented here on that basis. We leave it to the Government to demonstrate as much. In this brief, we urge that even if this Court were to agree with the Ninth Circuit's interupretation of the HAP contracts in *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the statutory provision enacted in response to that decision—and to other problems in the administration of the Government's housing program—challenged here as impairing respondents' rights under their HAP contracts, would not violate the Due Process Clause.

2. As the HAP contracts make explicit, respondents—owners of federally-assisted housing units—have *not* had, and do *not* have, a contract right to rental increases that result in the owner realizing rents that exceed by a material amount the rents charged for comparable unassisted units. The *Ranier View* interpretation of those contracts is not to the contrary. *Ranier View*'s conclusion is *not* that the HAP contracts provide for no overall limitation that confines the owner to a rent not materially in excess of the rent at comparable unassisted projects, but that there *is* such a limitation and that the Department of Housing and Urban Development ("HUD") adopted an erroneous approach to implementing that limitation. By holding HUD to that administrative error, the *Ranier View* remedy created a windfall to those project owners who would receive, as a result of that remedy, rents materially in excess of rents for "comparable unassisted units."

The HAP contracts created no reasonable expectation that the project owners would receive such a windfall. The express office of the "overall limitation" provision is to preclude any such expectation. And, it could not reasonably have been contemplated that a court would remedy an error in HUD's implementation of that provision by leaving the provision unenforceable.

At bottom, then, what respondents seek here is not constitutional protection for their reasonable contract-based expectations. Rather, respondents seek for themselves the same windfall that the *Ranier View* decision created for the project owners in that case. For, it is only that windfall—not any monetary return contemplated by the HAP contracts—that is put at risk by the statutory provision challenged here.

3. Were all the parties to the contracts in question private parties, respondents' due process claim would be frivolous under this Court's long-settled jurisprudence. *See, e.g., Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). But we recognize that the fact that the Government is a party to the contracts here gives this case an added dimension.

At the core of the concept of contract is the principle that a party cannot unilaterally diminish its contractual obligations. At the core of our concept of constitutional government is the principle that the Government must be able to govern. This Court has addressed the tension created by the coexistence of these two principles in the context of both the Contract Clause—where a contract to which a State is party is involved—and the Due Process Clause—where a contract to which the Federal Government is party is involved. In both contexts, this Court has stated that there is no absolute bar to subsequent legislative modification of a government's contractual obligations. And, in both contexts, this Court has recognized the limiting principle that a government contract cannot constitute a surrender of an essential attribute of the government's sovereignty.

4. While this Court has not fully developed the Due Process Clause standard that governs when Congress acts in a way that diminishes a contractual obligation of the Federal Government, it is at least clear from the case law that the Due Process Clause does not impose greater restrictions on the Federal Government than the Contract

Clause imposes on the States. And that is enough clarity for the decision of this case. For the statutory provision here would pass muster under the Contract Clause standard, and therefore, most assuredly passes muster under the Due Process Clause.

Respondents cannot meet the threshold requirement of showing that a reasonable contract-based expectation has been impaired. As *El Paso v. Simmons*, 379 U.S. 497, 515 (1965), states:

> Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to atack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.

Under that standard, the enactment challenged in this case is entirely consistent with the Constitution.

Moreover, the legislative purposes here are qualitatively different from those that this Court has found inadequate to justify a government's annulment of its own contractual obligations in previous cases. To the extent that Congress sought to save the Government money, it was money that constituted a windfall to project owners over and above what the owners could reasonably expect from their HAP contracts, and there was no annulment of the owner's reasonable expectations to contract payments. Moreover, the Legislature's purposes went beyond the saving of government funds. The situation here was one in which the pendency of a legal dispute over proper interpretation of a standard-form contract to which the Government is a party was interfering with the effectiveness of a government program designed to further important public interests. The Due Process Clause does not disable Congress from enacting a correction to such a situation, even where that correction may alter what the judicial system ultimately might have found to have been the Government's original contractual obligation.

ARGUMENT

1. *The Background.* The threshold question in resolving the constitutional issue presented here is the meaning of sections 1.9b and 1.9d of the housing assistance payment contracts ("HAP contracts") between the Department of Housing and Urban Development ("HUD") and respondents, owners of so-called "Section 8" rental housing projects.[1]

Section 1.9b of those contracts provides in pertinent part:

> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register . . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government.[2]

Section 1.9d adds:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided

---

[1] Section 8 of the Housing Act of 1937, as amended, 42 U.S.C. § 1437f ("Housing Act"), establishes a program which provides federally subsidized housing to millions of low-income tenants by authorizing government payment of rent subsidies. The United States, through HUD, enters into standard form long-term contracts with project developers and landlords. A project tenant's rental obligation is a function of his or her ability to pay, and the Federal Government makes payments to the project owner to bring total rental income up to the "fair market rental." *See* 42 U.S.C. §§ 1437a(a), 1437f(b) and (c).

[2] The relevant sections of the HAP contracts are quoted in *Ranier View Associates v. United States Dep't of HUD*, 848 F.2d 988, 989-90 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Section 8(c)(2)(A) of the Housing Act requires that HAP contracts provide for an annual adjustment in maximum monthly rents for covered units.

> in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.[3]

Prior to the enactment of the statute here at issue, the "adjustment factors" used by HUD were derived from general indices of inflation—the Consumer Price Index and the Bureau of the Census Housing Surveys—and were applied across broad regions of the country. *See, e.g.*, 52 Fed. Reg. 9478-9491 (1987) (establishing separate adjustment factors for four census regions, for Alaska and Hawaii, and for seventy-two metropolitan areas). These adjustment factors did not purport to be predicated upon—or even to reflect—data as to the market rents for "comparable unassisted units" in any particular housing market. Rather, HUD attempted to implement the "overall limitation" on Section 8 rental payments stated in section 1.9d of the HAP contracts through a two step process. In addition to deriving the adjustment factors in the manner just noted, HUD undertook to make targeted comparability studies with respect to certain individual Section 8 housing projects. Where these studies showed that the rents that would obtain for an assisted project by virtue of application of the adjustment factors would be materially higher than the rents for comparable unassisted projects in the relevant market, HUD sought to limit the amount of the rent for the assisted projects to a level that would not result in such a material difference.[4]

---

[3] Section 8(c)(2)(C) of the Housing Act requires that this provision appear in every HAP contract.

[4] As the proviso to section 1.9d of HAP contracts states, these determinations did not include in the calculation of rental differences those "differences exist[ing] with respect to the contract rents set at Contract execution or cost certification." *See also* 24 C.F.R. § 880.609(c).

The Ninth Circuit in *Ranier View Associates v. United States Dep't of HUD*, *supra*, interpreted the HAP contracts to bar HUD's method of implementing section 1.9d's "overall limitation." According to *Ranier View*, under the HAP contracts, the only permissible way for HUD to implement section 1.9d's requirement that there be no material "differences betwen the rents charged for assisted and comparable unassisted units" was to modify the Agency's adjustment factors formula so that the formula itself—and not a second step comparability study—incorporated sufficient comparability data to preclude material differences between the rents for any assisted project and comparable unassisted units.

As we discuss below, the *Ranier View* decision was one of the events that precipitated the passage of the statutory provision under challenge here: section 801 of the HUD Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 ("the 1989 Act"). That provision is challenged on the ground that it deprives respondents of rights established by the HAP contracts in violation of the Due Process Clause of the Fifth Amendment. That challenge rests, in the first instance, on the correctness of the *Ranier View* interpretation of the HAP contracts. If, as the Government contends, that interpretation is wrong and HUD's method of implementing section 1.9d was consistent with the contracts, the Due Process claim of respondents must fail. Thus, if the Government's interpretation prevails, Congress' resolution of this matter in section 801 of the 1989 Act—which as discussed, *infra* pp. 10-11, gives to respondents and similarly situated project owners *more* than they would have been entitled to under the Government's interpretation of the contracts—could not be said to impair any of respondents' contractual rights.

We believe that the Government's interpretation of the HAP contracts is the proper interpretation and submit that the Court should embrace that interpretation and

that this case should be decided on that ground. We leave it to the Government to demonstrate as much, and in the balance of this brief we urge that even if this Court were to agree with the *Ranier View* interpretation of the HAP contracts, section 801 would not violate respondents' rights under the Due Process Clause. Accordingly, we henceforth assume, for purposes of analysis, that *Ranier View* properly interprets the HAP contracts.

2. *Section 801's Impact on the HAP Contracts.* The starting point for analysis of the due process question as we have just stated it is to identify what, if any, of respondents' contractual rights are impaired by section 801 of the 1989 Act. We initiate this inquiry by examining the statutory provision challenged here and then assess the impact of that provision upon the contractual rights of respondents.

a. Section 801 was enacted as one provision of a major piece of legislation effecting a wide range of reforms at HUD in the wake of highly publicized evidence of corruption in, and mismanagement of, the Department.

The Senate Banking, Housing and Urban Affairs Committee stated that section 801 "seeks a fair, nationwide settlement of the harm caused by the Reagan Administration's maladministration of the Section 8 . . . program." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989) (Section-by-section analysis of the bill prepared by the Senate Banking, Housing and Urban Affairs Committee, placed in the record by Senator Cranston). In particular, the legislative history of section 801 indicates that the provision was the product of three distinct congressional concerns.

First, the Senate Committee statement expressed a concern that the comparability studies conducted by HUD "suffered from serious procedural deficiences," *id.*:

> Field offices were able to devise their own rules for comparability studies since no uniform guidelines (published or otherwise) existed. Owners in different part of the country were, therefore subjected to differing procedures without any justifying rationale. [*Id.*; *see also id.* at S16,594 (statement of Sen. Cranston, the bill's chief sponsor in the Senate).]

Second, the Committee stated that it "did not . . . share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies." *Id.* at S16,600. The Committee believed that "a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." *Id.* In this connection, the Committee expressed a particular concern that "[t]he court's award of damages—retroactive payments based on the [adjustment factors] applied to the full contract rents—would have HUD paying rents that in some areas are significantly above the local rent levels." *Id.* As Senator D'Amato, a co-sponsor of the bill, stated, payments computed in this way, with no mechanism for reflecting the market comparability requirements stated in the HAP contracts, would constitute "windfall payments" to developers and owners of Section 8 projects. *Id.* at S16,601-02.

Third, the legislative materials indicate a congressional concern that the combined result of the maladministration of the comparability studies and the *Ranier View* decision—a decision of a single circuit—was to leave the operation of the Section 8 program in a state of confusion and instability. In Senator D'Amato's words, section 801 was designed to "eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." *Id.* at S16,602; *see also id.* at S16,600-01 (statement of Senate Committee); S16,594 (statement of Sen. Cranston).

The statutory provision adopted by Congress is well tailored to meet these concerns without depriving owners and developers of their legitimate contractual interest in adjustments over time that maintain rents for assisted units at a level not materially different from rents for

"comparable unassisted units." The approach of section 801 is to deal separately with the past—the period from fiscal year 1980 until regulations implementing section 801 take effect—and the future.

As to the past, section 801 does *not* seek to implement the Government's interpretation of section 1.9d of the HAP contracts that was rejected in *Rainier View*. Rather, Congress adopted a middle ground. In cases where rents were reduced or where rental increases were limited as a result of comparability studies—and in cases where owners did not request a rental increase because of "anticipated negative adjustment(s)" due to comparability studies—section 801 provides retroactive monetary relief to the project owners.[5] The amount of that relief is predicated on a modified form of the relief awarded in *Ranier View*: for each year in the period covered, owners are, in effect, entitled to receive retroactive rental increases equal to the product of the applicable published adjustment factor for that year multiplied by the "contract rent minus the amount of the contract rent attributable to debt service." *See* section 801(a)(1)(B).

Thus, Congress permitted the project owners to receive retroactive rental increases that are based on general inflation indices and are not limited by specific market comparability data, with one qualification. Owners are not to receive the benefit of inflation increases calculated on the basis of certain *fixed* costs—debt service costs—that are by definition *not* affected by inflation. And, that qualification is tempered by an added protection to the owners: section 801 provides that "in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment

[5] Section 801(a) does *not* apply to housing projects covered by a prior final judgment in litigation over the authority of the HUD Secretary to use comparability studies to limit rent adjustments. *See* § 801(a)(2)(B).

factor multiplied by the full contract rent for each year. . . ."

As to the future, section 801 provides a scheme for implementation of the "overall limitation" provision in HAP contracts—a provision required by statute to be included in such contracts (see *supra*, note 3)—that in significant part is predicated on the *Ranier View* analysis.

In essence, HUD is to promulgate regulations for conducting comparability studies—either at the request of a project owner or at the initiation of the Secretary—"by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor" previously published by HUD. Section 801(c). Section 801 goes on to specify the types of comparability data that are to be used in determining this modified annual adjustment factor. Only where the Secretary determines that such a modified adjustment factor "cannot be established" or would "when applied to a particular project . . . result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area," may the Secretary "apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from the rents charged for comparable unassisted units." *Id.*

b. Against that background, we turn to a consideration of how, if at all, section 801 affects the contractual rights of respondents.

As section 1.9d of the HAP contracts makes explicit, respondents have *not* had, and do *not* have, a contract right to rental increases that result in the owner realizing rents that exceed by a material amount the rents charged for "comparable unassisted units." *Ranier View*

is not to the contrary. That decision recognizes that the owner's right is a right to a rent comparable to the rent at such unassisted units. Indeed, *Ranier View* makes it clear that the HAP contracts provide HUD with the right—and, according to the Ninth Circuit, a particular means—to avoid the payment of any subsidy that results in excessive rents.

The rub is that the means to that end identified in *Ranier View*—modification of the adjustment factors formula "to keep assisted rents in line with market rents" (848 F.2d at 991)—was *not* the means adopted by HUD prior to the enactment of section 801. Rather, as we have discussed, the adjustment factors published by HUD reflected inflation data of a more general nature and those adjustment factors could and apparently did produce Section 8 rents materially higher than market rents at comparable unassisted units.

Consistent with its understanding of the HAP contracts, the court in *Ranier View* could, practicalities aside, have provided a remedy permitting HUD retroactively to modify the adjustment factors applicable in that case. Such a remedy might well have diminished the rent subsidies due to the project owners. But, even under the *Ranier View* analysis, that remedy would not have deprived those owners of rental increases to which the owners were entitled under their HAP contracts. For whatever reason, that was not the remedy adopted in *Ranier View*. Rather, the Government was ordered to pay subsidies to those project owners based on rent adjustments that were to be determined solely by reference to the previously published adjustment factors—adjustment factors which were not designed to achieve the contractual end of limiting rents to levels not materially different from rents for "comparable unassisted units" in particular housing markets.

Ranier View, then, may have properly restricted HUD to the *means* contemplated by the HAP contracts—a

proposition we assume for purposes of this analysis. But on any interpretation of those contracts, the *Ranier View* remedy frustrated achievement of the *end* specified by those contracts—the Government payment of rent subsidies within the agreed-upon "overall limitation" stated in section 1.9d.

Ranier View's conclusion is *not* that the HAP contracts provide for no overall limitation that confines the owner to a rent not materially in excess of the rent at comparable unassisted projects, but that there *is* such a limitation and that HUD adopted an erroneous approach to implementing that limitation. By holding HUD to that administrative error, the *Ranier View* remedy created a windfall to those project owners who would receive, as a result of that remedy, rents materially in excess of rents for "comparable unassisted units."

The HAP contracts—as the foregoing shows—created no reasonable expectation that Section 8 project owners would receive such a windfall. The express office of the "overall limitation" provision is to preclude any such expectation. And, it could not reasonably have been contemplated that a court would remedy an error in HUD's implementation of that provision by leaving the provision unenforceable.

c. At bottom, then, what respondents seek here is not constitutional protection for their reasonable contract-based expectations. Rather, respondents seek for themselves the same windfall that the remedy in *Ranier View* created for the project owners in that case. For, as we have noted, *supra* p. —, it is only that windfall—not any monetary return contemplated by the HAP contracts—that is put at risk by section 801.

It is true that in the retrospective portion of section 801 the line that is drawn between permissible and excessive rental increases is not necessarily congruent in all cases with the line that would be drawn by application of comparability data in the manner permitted by

Ranier View. But the former line appears to be a fair, as well as a practical, approximation of the latter line. Thus, section 801 provides for retroactive rental increases over and above what was shown to be—or what project owners feared would be shown to be—allowable rents as measured by HUD's comparability studies. As we have noted, *supra* p. 10, retrospectively, project owners are permitted to take advantage of HUD's published annual adjustment factors, in unmodified form, subject only to the limitation that such factors—which reflect overall inflation during a specified period—shall not be applied as against certain owner costs that were *fixed* during that period. There is no basis for concluding that the retroactive rental increases allowed by this method would in any systematic way be lower than the increases would have been had HUD from the beginning followed the approach to implementing the "overall limitation" provision allowed by *Ranier View*.

And, again assuming that *Ranier View* correctly interprets the HAP contracts, the prospective portion of section 801 does *not* deprive project owners of any substantive or monetary right established by those contracts. As we have noted, *supra* p. 11, only when modification of the adjustment factors is not a practical or an adequate means to achieve the comparability objective of the "overall limitation" provision does the prospective portion of section 801 take what may be a step beyond *Ranier View*'s interpretation of the contract, by allowing the Secretary, in those limited circumstances, to apply "an alternative methodology." And, such an alternative methodology can be used only "to establish rents that are not materially different from rents charged for comparable unassisted units." *See* section 801(c).

It may be that under *Ranier View*, this ability of HUD, as a last resort, to apply an alternative methodology, when modification of the adjustment factors is not a feasible means to achieve the required market comparability, gives the Department an option not contemplated by the HAP contracts. The *Ranier View* court had no occasion to address that question and apparently assumed that the ability to modify the adjustment factors based on comparability studies would be sufficient in all cases to achieve the government interest stated in the "overall limitation" provision. But in the final analysis the alternative methodology is merely an additional means to achieve the result mandated by the "overall limitation" in section 1.9d of the HAP contracts. Unless respondents have a vested contractual right in the inadequacy of the means stated in the contracts to accomplish the objective also stated in the contracts, respondents could not show that this additional procedure, even if not contemplated by the contracts, deprives them of a rental increase as to which they had a reasonable contract-based expectation.

3. *Due Process Clause Challenges to Statutes Affecting Private Contracts.* The contracts at issue here are between the Government and private parties. The contractual obligations that respondents claim are altered are the Government's obligations. Were it otherwise—were all the parties to the contracts in question private parties—respondents' Due Process Clause claim would be frivolous under this Court's long-settled jurisprudence.

First of all,

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). [*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).]

This Court has "further explained that the strong deference accorded legislation in the field of national economic

policy is no less applicable when the legislation is applied retroactively." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Turner Elkhorn Mining Co.*, 428 U.S. at 16. And, this Court has stated in the clearest terms the standard to be applied in such cases:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . . [*R.A. Gray & Co.*, 467 U.S. at 729.]

Here, the legislative purposes of remedying maladministration of a regulatory program, avoiding unanticipated windfall profits that result from an error in operation of a government program, and achieving a higher degree of certainty and stability in a regulated market constitute legitimate statutory objectives. And, as we have discussed, *supra* pp. 9-11, the means chosen by Congress are well suited—and are certainly rational means—to accomplish those purposes.

4. *Due Process Clause Challenges to Statutes Affecting Contracts Between the Government and a Private Party.* We hasten to add that the fact that the Government is a party to the contracts at issue here gives this case an added dimension; a dimension we explore now.

a. At the core of the concept of contract is the principle that a party cannot unilaterally diminish its contractual obligations. An unlimited power in the Government to diminish its own contractual obligations on the assertion of a legitimate governmental objective cannot be reconciled with this principle. As Alexander Hamilton put it, "It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." 3 Hamilton's Works

518, 519 (quoted in *Perry* v. *United States*, 294 U.S. 330, 351 n.3 (1935)).

At the same time, at the core of our concept of constitutional government is the principle that the Government must be able to govern. The Legislative Branch cannot be disabled by the Government's contractual obligations from deploying its Article I powers to address the Nation's problems. A Government contract, then, does not constitute a "surrender[] [of] an essential attribute of its sovereignty." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977).

b. This Court has grappled with the tension created by the coexistence of these two principles most recently in the context of claims under the Contract Clause of Article I of the Constitution, which, of course, by its terms—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts," Art. 1, § 10, Cl. 1—applies only to the States.

United States Trust Co. v. New Jersey, supra, is the seminal modern Contract Clause case involving legislative alteration of a State's contractual obligation. There, two States entered into contracts, in the form of statutory covenants, with the holders of certain bonds, providing that the "revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the level of 'permitted deficits.'" 431 U.S. at 25. Each State then, by statute, purported to repeal its statutory covenant. Bondholders brought suit against one of the States, claiming that repeal of the covenant violated the Contract Clause.

After assessing the tension between the interest in maintaining the integrity of government contracts and the interest in protecting the ability of a State to carry out its governmental functions, the *United States Trust Co.* Court stated the following standard:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. [431 U.S. at 25-26 (footnotes omitted).]

Applying that standard, the Court found that the Contract Clause was violated by the State's direct repudiation of the statutory covenant for the purpose of allowing the State to spend the obligated reserves on other governmental objectives.

c. The Framers did *not* include in the Constitution a prohibition on the Federal Government parallel to the prohibition on the States set out in the Contract Clause. And this Court has been wary of reading such a prohibition into the general terms of the Fifth Amendment's Due Process Clause:

> We have never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. *See, e.g., Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, n.13 (1977). [*R.A. Gray & Co.*, 467 U.S. at 733.]

At the same time, the Court has noted that a "dual standard of review" may apply where legislation affecting contract rights is challenged under the Due Process Clause depending on whether the contract affected is between private parties or between the Government and a private party. *United States Trust Co.*, 431 U.S. at 17 n.25. The Court has not, however, elaborated on the Due Process Clause standard that governs when Congress acts in a way that diminishes a contractual obligation of the Federal Government.

What guidance we have comes from *Lynch v. United States*, 292 U.S. 571 (1934). The *Lynch* Court confronted the following set of facts. Pursuant to an Act of Congress, the Government had issued War Risk Insurance policies, which granted insurance against death or permanent disability in consideration for the payment of prescribed monthly premiums by the insureds. In issuing these policies, no power was reserved by the Government to curtail the benefits that the Government contracted to pay. Subsequently, however, Congress enacted a statute purporting to repeal the act that had authorized the issuance of these policies and thereby to relieve the Government of all liability to pay the promised insurance benefits.

The *Lynch* Court recognized that there are circumstances where the Government, consistent with the requirements of the Due Process Clause, must be able to alter its own contractual obligations: "[T]he due process clause prohibits the United States from annulling [the insurance contracts], unless, indeed, the action taken falls within the federal police power or some other paramount power." 292 U.S. at 579. On the facts of *Lynch*, however, the Court found that the only reason for the Government's annulment of its obligation to pay insurance benefits was the resulting savings the Government

would realize. Accordingly, the Court concluded that Congress' action was not predicated on any such "paramount power":

> Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. [*Id.* at 580.] [6]

d. While all is not clarity, it is at least clear from the case law that the Due Process Clause does *not* impose greater restrictions on the Federal Government than the Contract Clause imposes on the States. And that is enough clarity for the decision of this case. For section 801 would pass muster under the Contract Clause standard stated in *United States Trust Co.*, and therefore,

[6] *See also Perry v. United States*, 294 U.S. 330 (1935). Although *Perry* involves a related factual situation, the case does not appear to have been decided on the basis of the Due Process Clause. In *Perry*, holders of United States bonds " 'payable . . . in gold coin of the present standard of value' " challenged an act of Congress nullifying this promise. The Court phrased the "question" in terms of Congress' "power . . . to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States." *Id.* at 348, 350. The Court answered that question as follows:

> The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government,—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. [294 U.S. at 353-54.]

Based on this analysis, the *Perry* Court stated its conclusion on the merits of the case as follows:

> We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power. [294 U.S. at 354.]

most assuredly passes muster under the Due Process Clause.

The threshold Contract Clause requirement is a showing by the claimant that a reasonable contract-based expectation has been impaired. The legislative enactment here—unlike those in *United States Trust Co.*, and in *Lynch*—does not repudiate a contractual obligation of the Government. Indeed, section 801 does not even work a diminution of any reasonable contract-based expectation as to payment from the Government. What section 801 may diminish or eliminate is not a contractual entitlement, but a windfall resulting from an error by HUD in administering the Section 8 program. Thus, the respondents in this case have not even succeeded in opening the door to the constitutional inquiry.

This Court's decision in *El Paso v. Simmons*, 379 U.S. 497 (1965)—a Contract Clause case—is very much in point. There the State had entered into contracts with private parties, which had the "unforseen" and "unintended" effects of conferring "windfall benefits" on speculators, *United States Trust Co.*, 431 U.S. at 31 (describing the facts of *El Paso*), and of imposing "a costly and difficult burden on the State," *El Paso*, 379 U.S. at 515. The State subsequently enacted legislation altering its contractual obligations so as to eliminate those unintended results. The Court applied the following rule:

> Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract. [379 U.S. at 515.]

As we have demonstrated, section 801 is properly viewed as a "[l]aw[] which restrict[s] a party to those gains reasonably to be expected from the contract . . . ." *Id.*

Proceeding with the remainder of the constitutional inquiry serves only to confirm that there is no due proc-

ess violation here. The next step in the inquiry is to look at the reasons for Congress' enactment—as opposed to the effect of the enactment on the owners (which is the focus at the threshold). It is apparent that the legislative purposes here are qualitatively different from those that the Court found inadequate to justify annulment of the contractual obligations in *United States Trust Co.* and in *Lynch*. Here, to the extent that the Legislature sought to save the Government money, it was money that constituted a windfall to project owners over and above what they could reasonably expect from their HAP contracts. Section 801 is not fairly seen as an effort to renege on a Government obligation.

Moreover, the legislative purposes here went beyond the saving the government funds. In the wake of *Ranier View*, and this Court's denial of review in that case, Congress faced instability and uncertainty in the administration of the Section 8 program. HUD disagreed with the *Ranier View* interpretation of the HAP contracts and had a substantial basis for so disagreeing.[7] Neither HUD nor Section 8 project owners across the country could rely with any certainty on the rules governing annual adjustments in government rent subsidies. This uncertainty was compounded by the lack of uniformity in HUD's conduct of comparability studies. *See supra* pp. 8-9. Congress determined that this instability had to be addressed in order to achieve the "smooth and effective operation of the Section 8 program." *See supra* p. 10.

It is true that to the extent the instability was due to the lack of an ultimate judicial resolution of the *Ranier View* issue, Congress could have stayed its hand until the judicial system produced such a result. But the Constitution does not mandate such legislative quietism. And,

[7] *See Carmichaels Arbors Assos. v. United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal pending, No. 92-3326 (3d Cir.); *Sheridan Square Partnership v. United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n v. United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).

Congress' constitutional options went beyond adopting the *Ranier View* interpretation.

The situation here was one in which the pendency of a legal dispute over the proper interpretation of a standard-form contract to which the Government is a party was interfering with the effectiveness of a government program designed to further important public interests. The Due Process Clause does not prevent Congress from exercising "the federal polic power or some other paramount power," *Lynch*, 292 U.S. at 579, by adopting a well-crafted correction to such a situation, even where that correction may alter what the judicial system ultimately might have found to have been the Government's original contractual obligation. Any such holding would cut far too deeply into the principle recognized in both *Lynch*, 292 U.S. at 579-80, and *United States Trust Co.*, 431 U.S. at 23-25: the Government's contractual obligations may not effect a "surrender[]" of "an essential attribute of its sovereignty." *Cf. Stone v. Mississippi*, 101 U.S. 814, 820 (1880) ("the power of governing is a trust committed by the People to the government, no part of which can be granted away").

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief for petitioners, the decision of the United States Court of Appeals for the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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No. 92-551

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY G. CISNEROS, Secretary Of The United States Department of Housing And Urban Development, *et al.*,
Petitioners,

v.

ALPINE RIDGE GROUP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CHARTER FEDERAL SAVINGS BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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v.

ALPINE RIDGE GROUP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CHARTER FEDERAL SAVINGS BANK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, this brief *amicus curiae* is filed with the written consent of all parties. The written consent of the Petitioner United States Department of Housing and Urban Development ("HUD") and both counsels of record for Respondents Alpine Ridge Group *et al.* ("Alpine Ridge") have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

1. Charter Federal Savings Bank ("Charter") is an $800 million federal savings bank with offices throughout the 250 mile corridor between Knoxville, Tennessee and Roanoke, Virginia.

2. Charter has a significant interest in this case because it, like the respondents in this case, brought suit against a government agency seeking, *inter alia*, a remedy for Congress' repudiation of certain government contractual obligations. In both cases the government claims a right to amend or abrogate, with impunity, bargained-for financial agreements to which it is a party, and from which it has received valuable consideration. Charter currently has before this Court a petition for certiorari, which raises many of the same issues as the instant case. *See Charter Federal Sav. Bank v. Director, Office of Thrift Supervision*, 976 F.2d 203 (4th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3511 (U.S. Jan. 4, 1993) (No. 92-1142).

3. Because the Fourth Circuit in *Charter Federal* relied principally on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), and its "unmistakability doctrine" for its holding, Charter's interest in this case properly is confined to the Ninth Circuit's interpretation and application of *Bowen* to contracts to which the government is a party.

SUMMARY OF ARGUMENT

1. The question before this Court is whether a sovereign can repudiate with impunity a contract to which it is a party, and from which the sovereign has received valuable consideration. Misconstruing language in this Court's *Bowen* decision, HUD urges an affirmative answer to this question. Properly construed, however, the "unmistakability doctrine" as enunciated in *Bowen* has no application in the instant case. As such, the Ninth Circuit properly rejected the government's proposed application of *Bowen* to the facts of this case.

Essential to this conclusion are the factual dissimilarities between this case and *Bowen*. First, the *Alpine Ridge* contracts were bargained-for deals supported by independent consideration. Second, the respondents here do not challenge Congress' power to amend the legislation in the exercise of "public and general acts of a sovereign." Third, respondents' contracts do not incorporate statutory language granting the government the right to amend or repudiate the contracted-for rights. In short, the factual underpinnings of *Bowen* distinguish it from *Alpine Ridge* and render its holding and logic wholly inapposite to the facts of this case.

2. An adoption of the government's proposed application of *Bowen* would lead to the absurd result of rendering all contracts with the government illusory and unenforceable.

3. The government argues that if the respondents have vested contract rights, section 801 does not constitutionally impair those rights because the legislation has a rational basis. This Court, however, has never adopted a "rational basis" test to review allegations of government breaches of its *own* contracts. To the contrary, this Court has suggested that a more rigorous standard is appropriate.

ARGUMENT

CONGRESS' ABROGATION OF ITS CONTRACTUAL OBLIGATIONS VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

While Charter embraces the Ninth Circuit's repeated finding that HUD entered into contracts with the respondents whereby HUD agreed to use a "formula method" to calculate yearly rental adjustments, *see Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992); *Rainier View Associates v. United States Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), Charter confines its discussion below to the narrow but important issue of whether *Bowen* and related principles shield the government from liability resulting from its decision to repudiate certain of its contractual obligations.

I. THE NINTH CIRCUIT PROPERLY REJECTED THE PETITIONER'S ASSERTION THAT *BOWEN* PERMITS THE GOVERNMENT TO REPUDIATE, WITH IMPUNITY, CONTRACTS TO WHICH IT IS A PARTY

In the court of appeals, HUD relied primarily on *Bowen* to argue that the respondents' contract rights were not "vested." Specifically, the agency asserted that Congress "can radically change statutory language underlying a government contract, *thereby changing the contract itself*." Brief for Appellants at 39 (filed in the court of appeals on May 9, 1991) (emphasis supplied); *see also Alpine Ridge*, 955 F.2d at 1385. The Ninth Circuit properly rejected this novel interpretation of *Bowen*.

A. The Factual Underpinnings Of *Bowen* Distinguish It From *Alpine Ridge* And Render Its Holding Wholly Inapposite To The Facts Of This Case

In *Bowen*, this Court held that Congress' decision to amend § 418 of the Social Security Act, and thereby eliminate a State's right to terminate agreements with the

Secretary of Health and Human Services, did not effect a taking of property in violation of the Fifth Amendment. *Bowen*, 477 U.S. at 54-56.

The instant case, however, is starkly different than both the letter and spirit of *Bowen*. First, where *Bowen* involved a party's challenge of Congress' power to amend a statute, *Alpine Ridge* does not. *See Alpine Ridge*, 955 F.2d at 1385 (citation omitted) ("Here, the owners do not challenge Congress's power to amend the terms of the underlying legislation in the exercise of 'public and general acts of a sovereign'.").

Second, this Court expressly found that the termination clause in the § 418 Agreement was *not*:

> a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

Bowen, 477 U.S. at 55. The § 418 agreement, therefore, did not rise to a property interest protected by the Fifth Amendment. *Alpine Ridge*, in contrast, involves a bargained-for contractual right paid for with valuable consideration. *Alpine Ridge*, 955 F.2d at 1385 ("[The owners] assert that their contract rights are supported by independent consideration and are therefore vested under the Supreme Court's decisions in *Lynch* . . . and *Perry* . . . ."); *see also Acacia Villa v. Kemp*, 774 F. Supp. 1240, 1248 (C.D.Cal. 1990) ("[*Alpine Ridge*] falls into the category of cases that the *Bowen* court was careful to distinguish. . . . The [respondents'] contracts are not gratuities; rather, they are bargained-for agreements, for which [respondents] paid valuable consideration. . . .").[1]

[1] For example, where the government in *Bowen* received nothing in return for the § 418 Agreement, *see Bowen*, 477 U.S. at 55 ("The termination clause was not . . . a term . . . for which the State

Third, unlike the statutory and contractual framework of this case, the *Bowen* Court confined its holding to agreements that *reference* and *incorporate* statutory language, like that found in the Social Security Act, that explicitly reserves to Congress "[t]he right to alter, amend, or repeal any provision of the Act." *Bowen*, 477 U.S. at 51-52 (citations omitted) (internal quotation marks omitted). In *Bowen*, both the contract and the statute mandated that the § 418 agreements track the terms of the legislation. Specifically, the *contract* required that "its terms [be] '*in conformity with*' § 418," 477 U.S. at 54 (emphasis supplied), while the *statute* required that agreements made thereunder be "*not inconsistent with* the provisions of this section." *Id.* at 54 n.19 (citing 42 U.S.C. § 418(a)(1)) (emphasis supplied). Because the § 418 contract language, and the statutory language, put the contracting party "on notice that the terms of its Agreement must mirror the provisions" of § 418, *id.*, including the language of reservation, this Court concluded that the agreement "simply cannot be viewed as conferring any sort of 'vested right' . . . ." *Id.* at 55.

In contrast to the Social Security Act, § 801 of the Department of Housing and Urban Development Act of 1989, Pub. L. No. 101-235. 103 Stat. 1987 (1989), contains *no* explicit reservation language, and *no* language requiring that contracts made pursuant to the statute be "not inconsistent" with § 1437f. Nor do the contracts in question require that the terms be "in conformity" with the statutory language. In short, none of the underlying facts supporting the *Bowen* rational is present here.

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provided independent consideration"), the government in this case received substantial benefits including housing construction, development, and leasing to low income tenants.

B. Adoption Of The Petitioner's Application Of *Bowen* Would Render All Contracts With The Government Illusory

An application of *Bowen* that permits the government to alter or repudiate its contractual obligations with impunity would render *every* government contract illusory and unenforceable. The Supreme Court, however, echoing the words of Alexander Hamilton, long ago made clear that "[i]t is against the rules, both of law and reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." *Murray v. Charleston*, 96 U.S. 432, 445 (1877). *See also Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Indeed, the sort of *Bowen* application urged by the agency here, *i.e.*, that the government can repudiate its contractual obligations with impunity, has already been rejected by this Court, which characterized the contract construction "as an absurdity." *See Murray*, 96 U.S. at 445 ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.").[2]

II. HUD'S PLEA FOR THIS COURT TO UTILIZE THE "ARBITRARY AND IRRATIONAL" STANDARD WHEN REVIEWING LEGISLATION THAT REPUDIATES GOVERNMENT CONTRACTUAL OBLIGATIONS SHOULD BE REJECTED

The government argues that if the respondents have vested contract rights, § 801 does not constitutionally impair those rights because the congressional action in question was neither "arbitrary" nor "irrational." Brief of Petitioner at 35. In urging this Court to adopt this

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[2] If HUD's application of *Bowen* were adopted, future parties to a contract with the government would no doubt insist on a contract clause that absurdly states in substance the following: "The United States promises not to break the promises contained in this agreement." The irony, of course, is that under general contract principles, parties could, with certain exceptions, breach even this contract clause so long as they provide the other party with an adequate remedy.

minimal standard, HUD relies upon, *inter alia*, *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry.*, 470 U.S. 451, 472 (1985). In *National R.R.*, however, this Court expressly noted that the United States was not a party to the agreement, a distinction ignored by the government here:

> Because, as we have demonstrated, *neither the Act nor the Basic Agreements created a contract between railroads and the United States*, our focus shifts from a case in which we confront an alleged impairment, by the Government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. *We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply.*

470 U.S. at 471 (emphasis supplied). Without settling upon a specific standard when reviewing alleged government breaches of its own contracts, this Court strongly suggested that a heightened standard would be appropriate:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledger. This Court has given no sanction to such a conception of the obligations of our Government.

Id. at 471 and n.24 (citing *Perry v. United States*, 294 U.S. 330 (1935)). *See also id.* at 472 (emphasis supplied) ("When the contract is a *private* one, . . . the judicial scrutiny [is] quite minimal.").

To give substance to this Court's admonition in *National R.R.* and *Perry* that a government contract is more than a "vain promise, a pledge having no other sanction than the pleasure and convenience of the pledger," Charter submits that a heightened standard of review is appropriate when assessing government breaches of its own contracts. Indeed, adoption of HUD's proffered "rational review" standard would permit abrogation of contracts simply to save money, a plainly "rational" basis but one expressly rejected in *Lynch v. United States*, 292 U.S. 571 (1934), and *Perry*, 294 U.S. 330. Moreover, the standard would eviscerate the sanctity of contracts, and reduce government contracts to nothing more than illusory and unenforceable promises. *See* Part I.B., *supra*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondents' Brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October Term, 1992

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INTEREST OF THE *AMICI CURIAE*

Amici are savings banks or the owners of savings banks whose contracts with the United States were breached – as were those of respondents in this case – when Congress enacted legislation that abrogated key

terms of those contracts. *Amici* have each sued the United States seeking, *inter alia*, money damages for breach of contract and for the uncompensated taking and deprivation of property in violation of the Fifth Amendment.

Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Company are plaintiffs in the suit styled *Statesman Savings Holding Corp. v. United States*, No. 90-773C (Fed. Cl. filed Aug. 15, 1990). The United States Court of Federal Claims entered partial summary judgment as to liability in favor of plaintiffs on July 24, 1992. *Statesman Savings Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992). The case was certified and consolidated for appeal with two other related cases,[1] and that appeal is currently pending in the United States Court of Appeals for the Federal Circuit. *Winstar Corp. v. United States*, No. 92-5164 (Fed. Cir.). The suits of the other *amici* are in the discovery phase in the Court of Federal Claims and no trial dates have been set.[2]

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[1] The two related cases are *Glendale Federal Bank, FSB v. United States*, No. 90-772C (Fed. Cl. filed Aug. 15, 1990) and *Winstar Corp. v. United States*, No. 90-8C (Fed. Cl. filed Jan. 2, 1990).

[2] *Citizens Federal Bank v. United States*, No. 92-656C (Fed. Cl. filed Sept. 22, 1992) (Citizens Federal Bank, A Federal Savings Bank and CSF Holdings, Inc.); *Home Savings of America, FSB v. United States*, No. 92-620C (Fed. Cl. filed Sept. 4, 1992) (Home Savings of America, FSB and H.F. Ahmanson & Company); *Northeast Savings, F.A. v. United States*, No. 92-550C (Fed. Cl. filed Aug. 12, 1992) (Northeast Savings, F.A.); *Coast Federal Bank v. United States*, No. 92-466C (Fed. Cl. filed July 9, 1992) (Coast Federal Bank); *Republic Savings Bank, F.S.B. v. United States*, No. 92-265C (Fed. Cl. filed April 13, 1992) (MCB Financial Group, Inc., Meadows Resources, Inc., and Republic Holding Company).

The contracts to which *amici* are parties, and the legislation by which petitioners repudiated their obligations under those contracts, are not related to the contracts or legislation involved here. Consequently, this case raises questions of statutory and contract construction unrelated to the controversies in which *amici* are involved. Nevertheless, in both this case and those in which *amici* are involved, the government has attempted to avoid any liability for its repudiation of its contractual obligations on the ground that the sovereign can change or repudiate its contracts as it sees fit unless it has surrendered that power unmistakably. By "unmistakable surrender" the government does not simply mean a clear and express promise, bargained for at arm's length and supported by consideration, to undertake some act; rather, the government would require the contract to contain an additional, explicit promise not to repudiate that first promise at some point in the future.

Far from reflecting some well-established "modern view of congressional authority" as petitioners imply, Brief for the Petitioners ("Pet. Br.") at 33 n.31, petitioners' radical proposition is fundamentally at odds with the precedents of this Court. Petitioners seek to establish a power to avoid their contractual obligations with total impunity, a power that is effectively unlimited, or is limited only by contract language that has never appeared in any government contract, anywhere, at anytime.

Accordingly, *amici* have a strong interest in any ruling on this argument that the Court concludes to be necessary to the resolution of this case. Moreover, having joined issue with the government on this notion in a

variety of courts, *amici* are in a unique position to aid the Court in its consideration of the issue.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents contend, and the courts below found, that pursuant to the provisions of a federal statute and the express terms of written contracts, respondents and the Department of Housing and Urban Development ("HUD") entered into a binding contract governing how rent increases in certain low-income housing projects were to be calculated. Petitioners claim that this conclusion is based on an erroneous understanding of that statute and those contracts. *Amici* are not involved in that housing program and so are not in a position to contribute to those particular arguments in a manner helpful to the Court.

However, should petitioners be unable to bring this Court to their view of the statute and contracts, they advance several other arguments to avoid *any* liability for their breach of their promises, notwithstanding the contractual character of those promises under the law. The government's sovereign rights, according to petitioners, allow the government to enter an express, arm's length contract with a private party, receive the benefits of that party's performance, disavow its own promised performance at its pleasure, retain the benefits it has bargained for and received, and yet be insulated from any liability for its breach. This is so, according to petitioners, (1) because the "modern view" of government authority broadly "recognizes the prospective power of Congress to modify the government's contracts," Pet. Br. at 33 n.31, or

[3] Copies of the letters of the parties indicating consent to the filing of this brief are being filed with this brief.

(2) because a contract needs to expressly "surrender" Congress' sovereign power – in addition to any express promises of performance by the government – before a private contractor can truly rely on a contract promise made by the government, *id.* at 32, or (3) because " 'supervening conditions' implicating the police power" allow the government to breach its contracts with impunity, *id.* at 41-43, or, finally, (4) because the government is always free to breach its contracts so long as its does not do so simply to save money. *Id.* at 42-45.

Far from being "modern," all these arguments ultimately spring from an Old World understanding of the relationship of the sovereign to the citizen, an Old World understanding long abandoned by the American experiment and completely alien to our constitutional order. It is an elementary point of our law that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*"). If the rule petitioners urge here is to become our law, no citizen could ever enter into an arm's length bargain with the federal government that conveys real benefits to the government while exacting real obligations from it. Contrary to petitioners' proffered rule, this Court has consistently taught that both the Due Process and the Taking Clauses of the Fifth Amendment ensure that government contracts are not "vain promise[s] . . . having no other sanction than the pleasure and convenience of the pledgor." *Perry v. United States*, 294 U.S. 330, 351 (1935). Even when government performance of a contract is impossible because it would do serious harm to the public's health or safety, no precedent of the Court has held, on that account, that the original obligation was not truly contractual or that the government was

not obliged to compensate the innocent party for any injury caused by the breach.

The profound hostility of petitioners' proposition to our most basic constitutional premises was brought into sharp relief by an observation of the Court of Federal Claims in a recent opinion rejecting the very arguments the government presses here:

> The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support . . . in our constitutional tradition. Sovereign power is always restricted, in one sense, by the rights of individuals. However, in our Nation that has never been seen as an improper restriction on regulatory power. Rather, it is the foundation upon which all law and regulation are built.

Winstar Corp. v. United States, 25 Cl. Ct. 541, 548 (1992), *appeal pending*, No. 92-5164 (Fed. Cir. 1992).

ARGUMENT

I. GOVERNMENT PROMISES SUPPORTED BY CONSIDERATION BECOME VESTED RIGHTS WHEN THE GOVERNMENT RECEIVES THE CONSIDERATION

Throughout their argument, petitioners ignore a fundamental distinction under the law between gratuitous government promises and government promises made to secure a private party's contractual performance or detrimental reliance. To be sure, given the scope of modern government regulation, the government must retain the flexibility to revise public policy in the light of experience and to address issues of public importance in a manner different from – even at odds with – that chosen in the

past. And indeed, the Constitution does not require the government to adhere to a policy if it has received nothing in exchange for it, such as gratuitous promises to provide benefits to, or to refrain from regulating, certain persons or groups.[4]

For similar reasons, the government, unless its action is unusually harsh or arbitrary, is free to readjust, even retroactively, the burdens and benefits of agreements solely between private parties. By definition, these purely private arrangements confer no benefit on the government, and the contracting parties, particularly in a heavily regulated industry, rarely have any legitimate reason, much less a vested right, to expect that the law at the time of contracting will remain unchanged in perpetuity. *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717 (1984); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Consequently, the government's interference with private contracts is given much more deferential review than the government's impairment of its own commitments.[5]

However, petitioners are wholly mistaken when they imply that some "modern view of congressional authority" holds that the federal government is somehow entitled to repudiate its *own* obligations under a contract to

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[4] *See, e.g., POSSE*, 477 U.S. at 52 ("The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration."); *Flemming v. Nestor*, 363 U.S. 603 (1960) (Social Security benefits are not annuity contracts, and thus are gratuities unenforceable against the federal government.).

[5] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1976). *Compare Perry*, 294 U.S. at 350-51 *with Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 304-305 (1935).

which it is a party. In those circumstances, the private party's contractual right to receive the bargained-for performance of the federal government is a property right that the government cannot, under both the Due Process and the Taking Clauses of the Fifth Amendment, unilaterally extinguish through repudiation. As this Court has recognized, "[t]he United States are as much bound by their contracts as are individuals." *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).[6] In a long and unbroken line of cases, this Court and other courts have consistently held that when the government enters into a contract for the purpose of securing some specified performance from a private party, and that party fully performs its obligations under the contract, the private party's contractual right to receive the bargained-for performance of the government is a property right that the government cannot, consistent with the Fifth Amendment, unilaterally extinguish without compensation.

For example, in *Choate v. Trapp*, 224 U.S. 665 (1912), the Court upheld a lower court's decision enjoining enforcement of a statute purporting to tax Indian land that the federal government had pledged, both in written agreements and in a federal statute, would remain

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[6] *See also Perry*, 294 U.S. at 352 ("When the United States, with constitutional authority, makes contracts, it . . . incurs responsibilities similar to those of individuals who are parties to such instruments."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); 3 Joseph Story, *Commentaries on the Constitution* § 1385 (1833) ("[T]he legislature may make a contract with individuals directly by a law, pledging the state to a performance of it; and then, when it is accepted, it is equally under the protection of the Constitution.").

exempt from taxation for a certain period of time. In exchange for the pledge of tax exemption, the Indians had relinquished all equitable claims to common tribal property, by which the Court found the plaintiff Indians had "furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred . . . . " *Id.* at 672. The statutory pledge of tax-exempt status, therefore, "was a property right, which Congress undoubtedly had the power to grant." *Id.* at 673. Accordingly, "[u]nder the provisions of the 5th Amendment there was no more power to deprive [the Indians] of the exemption than of any other right in the property." *Id.* at 674.

The *Choate* Court distinguished prior decisions in which the government was allowed to repeal "general statutes containing, not a grant, but an offer of [tax] exemption" to companies that agreed to build certain projects and that "actually built in reliance on [the statute's] terms":

> The companies gave nothing, and the state received nothing in exchange for the offer. There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.

Id. at 674-75.

The distinction recognized in *Choate*, and applied by the Ninth Circuit below – that generally applicable statutory gratuities are normally revocable at will, while bargained-for commitments made in discrete agreements create constitutionally protected property rights – has been followed consistently by this Court in a variety of

other contexts.[7] In *Lynch*, 292 U.S. at 576, for example, the Court concluded that yearly renewable term insurance policies issued by the Federal Bureau of War Risk Insurance were "contracts of the United States" that could not be abrogated by Congress. In a unanimous opinion authored by Justice Brandeis, the Court enforced the insurance policies. Citing both the Due Process and the

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[7] *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("[v]alid contracts are property within meaning of the Taking Clause."); *United States Trust Co.*, 431 U.S. at 17 ("[T]he Contract Clause limits the power of the States to modify their own contracts."); *Wood v. Lovett*, 313 U.S. 362 (1941); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("[A] legislative enactment may contain provisions which, when accepted as the basis of action, become contracts between [individuals] and the State" protected by Contract Clause.); *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 71 (1931) ("[C]ancellation [of a contract] is an exercise of the power of eminent domain, and the liability of the government is for just compensation."); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121-22 (1924); *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 134 (1885) ("[A]fter the services have been rendered under a law, . . . there arises an implied contract to pay for the services."); *New Jersey v. Yard*, 95 U.S. 104 (1877); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850) ("[T]he promised compensation for services actually performed and accepted . . . may undoubtedly be claimed both upon principles of compact and of equity."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) ("When . . . a law is in its nature a contract, when absolute rights have vested under that contract; . . . repeal of the law cannot divest those rights."); *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 n.6 (Fed. Cir. 1988) ("[T]hat the government can always change the bargain . . . is anathema not only to the rule of law but to . . . principles of a great commercial nation."); *Larionoff v. United States*, 533 F.2d 1167, 1189 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977) ("[O]nce someone agrees to perform . . . in exchange for a . . . sum of money, and the Government has received that performance . . . the 'gratuity' becomes a contractual right.") (footnotes omitted).

Taking Clauses, the Court grounded its analysis on the proposition that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 579. The Court found consideration for the contractual obligation in the payment of prescribed monthly premiums. *Id.* at 576. The Court stated that "[a]s Congress had the power to authorize the Bureau of War Risk Insurance to issue [the policies], the due process clause prohibits the United States from annulling them . . . . " *Id.* at 579.

Notably, the *Lynch* Court rejected the argument that the insurance policy contracts were unenforceable "gratuities," such as pensions or hospital privileges, on the ground that, notwithstanding their "benevolent purpose," they were contracts supported by consideration and thus created vested property rights protected by the Fifth Amendment. *Id.* at 576-77.

Similarly, the Court held in *Perry* that Congress' invalidation of gold standard clauses in bonds issued by the United States "went beyond the congressional power." 294 U.S. at 354. The Court dismissed the decisions allowing the United States to impair *private* contracts with identical "gold clauses" as inapposite:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

Id. at 350-51.

The *Perry* Court also firmly rejected the argument that "when, with adequate authority, the government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their

fulfillment inconvenient." *Id.* at 350. The Court refused to "sanction . . . such a conception of the obligations of our government." *Id.* at 351.[8]

The circuit courts have also had occasion to consider a claim by the federal government that it need not honor its contractual commitment to private parties who have fully performed their end of the bargain. For example, in *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977), the D.C. Circuit held that a statute preventing payment of reenlistment bonuses promised in Navy reenlistment agreements violated the Due Process Clause. Relying on *Lynch* and *Perry*, the court ruled that "[s]ince contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed." *Id.* at 1179. The court contrasted government "gratuities," subject to congressional repudiation, with the much different situation in which "someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance . . . . " *Id.* at 1189. In such a case, "the 'gratuity' becomes a contractual right." *Id.*

This Court affirmed the D.C. Circuit's decision, albeit on slightly different grounds. The Court fully agreed that if Congress had intended to repeal the reenlistment bonuses extant at the time of the extension agreements, "serious constitutional questions would be presented." *United States v. Larionoff*, 431 U.S. 864, 879 (1977). The Court accepted the United States' argument that "Congress may prospectively reduce the pay of members of

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[8] *See also De La Rama S.S. Co. v. United States*, 344 U.S. 386, 388 (1953) ("[T]he Constitution precludes extinction of the Government's liability" under a war risk insurance policy.) (relying on *Lynch*).

the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn." *Id.* Relying on *Lynch* and *Perry*, the Court concluded that "[i]t is quite a different matter, however, for Congress to deprive a service member of pay due for *services already performed, but still owing.*" *Id.* (emphasis added). The Court did not reach this constitutional question, however, because it interpreted the subsequent congressional act as not affecting the right to reenlistment bonuses.

Even where traditional contract documents are not involved, the Court has recognized that a private party's expectations in some course of government conduct may legitimately rise to the level of a protected property interest. *Monsanto*, for example, involved a 1972 federal statute providing that trade secrets submitted to the Environmental Protection Agency in connection with registering pesticides would not be disclosed publicly or considered in connection with a rival company's pesticide application. In 1978 the statute was amended to remove a certain class of trade secrets from those disclosure protections. The Court unanimously held that a chemical company was entitled to compensation under the Taking Clause for any damage caused by disclosure of its trade secrets submitted during the 1972-1978 period because "the Federal Government had explicitly guaranteed . . . an extensive measure of confidentiality and exclusive use [for the trade secrets submitted]. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." 467 U.S. at 1011.[9]

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[9] *See also Hodel v. Irving*, 481 U.S. 704, 715-11 (1987) (invalidating congressional attempt to extinguish property interest created by earlier statute even though only consideration given to Congress in return was that property owners' "ancestors . . . ced[ed] to the United States large parts of the original Great Sioux Reservation."); *Kaiser Aetna v. United States*,

Thus, as the Ninth Circuit noted below, though the government assumes no obligation by virtue of a *gratuitous* promise unsecured by any consideration (or detrimental reliance) from the beneficiary, when it bargains for and receives valuable consideration for an express promise, particularly one contained in a bilateral contract, it may not then repudiate that promise, and keep the benefit received or otherwise escape liability for the breach.

In their effort to ignore the force of the cases discussed above, and the principle that Congress cannot impair vested contract rights, petitioners intently ignore the distinction between vested contract rights and gratuitous statutory provisions. For example, petitioners quote *Federal Housing Admin. v. The Darlington*, 358 U.S. 84, 91 (1958) for the general proposition that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Pet. Br. at 32-33. Yet petitioners overlook the fact that the Court found that no contract right existed in *The Darlington:* "[O]ne has to look long and hard to find even a semblance of a contractual right rising to the dignity of the one involved in *Lynch* . . . . " *Id.* at 91.

In *The Darlington*, the Court relied on the fact that the law prevailing at the time the contract was entered into did not give the private party the right it sought to enforce, and that the private party's contract with the government was *silent* with respect to the existence of that right. *Id.* at 87-90. Thus, the Court's refusal to infer

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444 U.S. 164, 179 (1979) ("[T]he consent of individual officials representing the United States . . . can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the land owner's property.").

that the private party had somehow obtained a vested property right is hardly surprising. What is surprising is petitioners' attempt to wring from the Court's holding the principle that an express promise in a valid contract can be repudiated with impunity. Far from supporting petitioners' case, *The Darlington* supports respondents' by framing the issue precisely: where there are no contract rights, Congress is free to legislate; but where contract rights have vested, Congress cannot impair those vested contract rights with impunity.[10]

Petitioners make the same error in their reading of *POSSE*. According to petitioners, *POSSE* "held that when Congress eliminated the States' contractual right . . . the contractual right lost did not 'rise to the level of "property" ' under the Fifth Amendment." Pet. Br. at 42 n.41 (quoting *POSSE*, 477 U.S. at 55). To the contrary, *POSSE* turned on the fact that there was no contract right to be protected because the government's promise was gratuitous. The Court noted, in distinguishing *Lynch* and *Perry*, that California had not bargained for the "right" it claimed to withdraw from the social security system, nor was that "right" supported by any "independent consideration," since the federal government could have forced the state to participate in the system at any time. *POSSE*, 477 U.S. at 55. Thus *POSSE*, like *The Darlington*, is not a vested rights case at all, and petitioners misconstrue the holding in those cases by arguing that they impart to

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[10] When placed in its proper context, therefore, *The Darlington* Court's admonition to "[t]hose who do business in the regulated field," 358 U.S. at 91, actually supports respondents' rights here. It is precisely because the regulatory regime may change that entities like respondents are not content to rely on regulatory pronouncements, but instead seek to negotiate binding contracts with the government.

Congress the power to abrogate existing, vested contract rights.[11]

II. NO PRINCIPLE OF LAW EXCUSES THE GOVERNMENT'S REPUDIATION OF ITS CONTRACTUAL COMMITMENTS

A. The Law Creates No Higher Standard For Contracts With The Government To Be Binding.

Petitioners further argue that respondents do not have enforceable contract rights because their contracts do not state in "unmistakable terms" that the federal regulators promised that Congress would never change the statute in such a way as to affect their right to rent adjustments. Pet. Br. at 32.[12] Petitioners have, by their

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[11] Similarly, petitioners quote this Court's decision in the *Sinking Fund Cases* in support of their assertion that Congress has the power to modify the government's contracts. Pet. Br. at 33 n.31. Yet in the sentences immediately following the sentence quoted by them, the Court sharply limited that power to "operation in the future." *Sinking Fund Cases*, 99 U.S. at 721. The Court held that a law altering or vacating contracts already entered into would be unconstitutional. *Id.* Although the Court went on to sustain the law at issue, it did so because nothing was taken "from the Corporation or the stockholders that actually belong[ed] to them." *Id.* at 726. In other words, the law, unlike here, did not actually alter or abrogate existing contract rights; it merely imposed new guidelines, where previously there had been none, for future conduct.

[12] In connection with their statutory arguments, petitioners suggest that the principles of deference stated by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) apply to their reading of the statute at issue here, and, therefore, to their reading of the relevant contract terms. Pet. Br. at 21, 26. *Amici* disagree. *Chevron* deference is inappropriate with respect to interpretations of agency contracts or statutes affecting agency contracts, since "deference might lead

passing reference to this "unmistakability doctrine," transformed a rather commonsensical notion into a formalistic doctrine that would render unenforceable nearly every contract between the government and private citizens. In fact, this Court has long held that Congress "unmistakably" waives its power to alter a statute retroactively when it makes an express affirmative promise; only when it makes *no* promise, is there no "unmistakable" waiver.

To be sure, the government's contractual commitments cannot override its responsibility to protect public health or safety.[13] Yet this recognition of the government's essential responsibilities has never been understood to erase from the law books the fundamental proposition that "the right to make binding obligations is a competence attaching to sovereignty." *Perry*, 294 U.S. at 353. Indeed, as *POSSE* and the case on which *POSSE* relied, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), show, the "unmistakable waiver" principle arose in response to a claim of a contract right in the face of governmental *silence*, not an explicit commitment, as here.

Merrion involved oil and gas leases granted by the Apache Tribe that were silent on the question of the Tribe's ability to impose severance taxes. In the absence of such a contract provision, the Tribe could not be held

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a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). *See also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992).

[13] *See, e.g., United States Trust*, 431 U.S. at 25 (a state's promise to secure a revenue bond by a particular public facility cannot be construed to bind the state never to close that facility for health or safety reasons).

to have waived its taxing power as to the lessees. As the Court concluded:

> We could find a waiver of the Tribe's taxing power only if we inferred it from *silence* in the leases. To assume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head . . . .

455 U.S. at 148 (emphasis added).

Quoting the above passage from *Merrion*, the Court in *POSSE* reiterated that a contractual obligation of the government cannot be inferred from silence. The *POSSE* Court reaffirmed, however, that an express contractual promise cannot be abrogated by a later exercise of sovereign power, noting that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and [its] concomitant duty to honor those rights . . . . " 477 U.S. at 52.

It was in this context – totally inapplicable here – that *POSSE* held that the government's sovereignty had not been waived in "unmistakable terms." Indeed, this Court has repeatedly recognized the incoherence of petitioners' rule of construction, *i.e.*, that every *express promise* by the government that it "will do X" carries the *implied condition* "unless the government changes it mind," which can be negated only by another express promise by the government that it "will not stop doing X." In rejecting precisely such an argument, the Court long ago observed, "[H]ow an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered." *Murray v. Charleston*, 96 U.S. 432, 444 (1878). In rejecting the notion that an explicit contractual promise can be abrogated by some inherent reservation of authority, the Court, quoting Alexander Hamilton, observed that a government contract so understood

> would "[i]nvolve two contradictory things: an obligation to do, and a right not to do – an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication the construction of a contract or principle which goes in destruction of it."

Id. at 445. The Court in *Perry* rejected this argument in similarly unequivocal terms, again quoting Hamilton:

> [W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of the legislator for that of a moral agent, with the same rights and obligations as an individual . . . . It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.

294 U.S. at 351 n.3.[14]

Thus, the Court should read petitioners' "unmistakability" argument for what it is: a thinly-veiled attempt to assert a right to avoid their express promises on the basis of a formalistic doctrine that has nothing to do with the parties' intent. Viewed in this light, the argument must, like petitioners' other conceptions regarding the "modern view of congressional authority," be rejected.

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[14] *See also* Story, *Commentaries* § 1385 ("[I]t may be laid down as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired. A grant . . . amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert it.").

B. The Circumstances Underlying The Government's Breach Do Not Excuse It From Liability.

1. Petitioners continue their effort to avoid the plain meaning of *Lynch, Perry*, and their progeny by attempting to limit their scope to cases where the government abrogated "vested rights . . . solely to save the government money . . . . " Pet. Br. at 42. The express language and reasoning of the cases, however, preclude such a cramped reading.

Amici will not comment on petitioners' strained factual argument that Congress abrogated respondents' contracts for reasons other than to save money. Even assuming the accuracy of this assertion, petitioners' legal argument is unsustainable. This Court's precedents have not treated government promises to pay money differently from other promises concerning regulatory or other sovereign powers.[15] Nor has this Court ever suggested that the government is free to repudiate its contractual promises so long as it has a rational justification other than its own naked desire to keep the money owed. For example, important aspects of legislation such as improving "[m]ass transportation, energy conservation, and environmental protection" during a national energy crisis (*United States Trust*, 431 U.S. at 28), exercising "Congress' paramount power to 'raise and support armies'" when the country was shifting to an all-volunteer military (*Larionoff*, 533 F.2d at 1191), putting into place a comprehensive national program to shift from the gold standard

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[15] *See, e.g., Hodel*, 481 U.S. at 706-08 (promise to allow Indians to pass on their interest in fractionated land); *Monsanto*, 467 U.S. at 992-93 (promise to maintain confidentiality of trade secrets submitted to EPA in registration of pesticides); *United States Trust*, 431 U.S. at 3 (promise not to spend all money for mass transportation); *Santobello v. New York*, 404 U.S. 257, 257-58 (1971) (promise of a specific sentence recommendation upon a guilty plea); *Sinking Fund Cases*, 99 U.S. at 719 (promise concerning payment schedule of money owed *to* the government).

in order to stabilize banking and currency during a time of worldwide financial crisis (*Perry*, 294 U.S. at 350-51), resolving the "serious public problem" of "extreme fractionation of Indian lands" (*Hodel*, 481 U.S. at 718), avoiding burdens and delays in a regulatory program from which the government did not profit (*Monsanto*, 467 U.S. at 993), or achieving essential government economies during the Great Depression (*Lynch*, 292 U.S. 571), have not excused the government from liability for repudiation of its contracts.

That the Court has never drawn the distinction petitioners urge here is hardly surprising: from a Constitutional or public policy perspective, the government's failure to pay *money* promised in exchange for valuable consideration is no different from reneging on any other promise. Promises not exclusively related to the payment of money can be as financially valuable to a contractor as promises for money, and repudiating such promises can save the government as much money as repudiating monetary debts. Moreover, enforcing the government's monetary obligations limits its flexibility no less than does enforcing its nonmonetary obligations. And Congress will always be able to invoke a legitimate purpose – in addition to the naked desire to save money – to justify its repudiation. Indeed, since the government must always have a legitimate government purpose for any legislation to survive substantive due process review, requiring it to articulate such a purpose in order to freely abrogate its contractual liabilities is no limitation at all.

2. Petitioners also make a suggestion, related to their argument that they are liable only for contract breaches designed solely to save money, that is remarkable for its potential scope. In distinguishing *Lynch*, petitioners note that that case did not involve "supervening conditions" and suggest that the presence of such conditions renders any congressional abrogation of the United States' contracts constitutionally valid. Pet. Br. at 43. In a

footnote, petitioners suggest that "ordinary uses of the commerce power" represent examples of such supervening conditions. *Id.* at n.42. Thus, in the guise of describing an *exception* to the constitutional limitation on the government's ability to abrogate its contracts, petitioners actually offer a rule that completely eviscerates any such limitation on governmental power. Petitioners are, quite simply and quite frankly, arguing that whenever Congress has power under the Commerce Clause to enact certain legislation, the exercise of that power cannot be challenged under the Due Process Clause, notwithstanding its effects on the contractual obligations of the United States. Such a principle makes the Fifth Amendment a dead letter, renders the government's contractual promises meaningless, and is completely unsupported by authority.[16] Moreover, the cases cited by petitioners either do not involve contracts at all or involve only private contracts. They can hardly, therefore, set the standard for

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[16] Indeed, the very cases cited by petitioners recognize that Congress' power under the Commerce Clause, though extensive, is limited by other provisions of the Constitution. *See, e.g., Hipolite Egg Co. v. United States,* 220 U.S. 45, 57 (1911) (Commerce power "is complete in itself, subject to no limitations except those found in the Constitution."); *Lottery Case,* 188 U.S. 321, 362-63 (1903) (Commerce power "is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."). *See also Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893) ("[L]ike the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . . ").

judging the constitutional validity of breaches of the government's *contractual* obligations, unless contracts with the government are, quite literally, not worth the paper they are written on.

Rather, the "paramount power" claimed by the government extends no farther than simply to excuse the government's performance (though not *liability, see infra* at 27-28) when unforeseen conditions not addressed in the contract at the time of its making have rendered performance impossible or a threat to the public's health or safety. *See United States Trust,* 431 U.S. at 25.[17]

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[17] *United States Trust* interpreted the requirements of the Contract Clause, which does not apply to the federal government. Petitioners suggest that the Contract Clause imposes more exacting requirements upon the states than the Fifth Amendment imposes on the federal government. Pet. Br. at 36 n.35. This is not so. While it is true that the Court has indicated as much concerning the impairment of *private* contracts, it has never hinted that the Due Process Clause or Taking Clause gives the federal government greater leeway to repudiate its own contracts than does the Contract Clause for the states. If anything, the Court's precedent indicates that the federal government is held to a higher standard under the Fifth Amendment than are the states under the Contract Clause. *See Perry,* 294 U.S. at 352-54; *United States Trust,* 431 U.S. at 23-26. This rule makes sense because the text and history of the Contract Clause clearly show that it acts as a restriction on the states' ability to interfere with *private* contracts, but it is far less clear that the Due Process Clause has any such effect in the private world. *See Allied Structural Steel v. Spannaus,* 438 U.S. 234 (1978); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,* 335 U.S. 525, 536 (1949). Conversely, however, it is quite clear that the Due Process Clause provides substantial restrictions on the actions of the *federal* government, while it is far less clear that the Contract Clause was intended to apply to contracts made by *state* governments. *See, e.g., United States Trust,* 431 U.S. at 45 (Brennan, J., dissenting); G. Gunther, *Constitutional Law,* 604 (1974); B. Wright, *The Contract Clause Of The Constitution,* 15-16 (1938).

In *United States Trust*, as noted earlier, the government's decision to violate a security covenant in a bond by spending toll revenues on mass transit served the substantial purpose of reducing automobile use during a nationwide energy crisis. *Id.* at 28. The Court nonetheless rejected the state's claim that the existence of such goals justified abrogating a particular contract, explicitly declining "this invitation to engage in a utilitarian comparison of public benefit and private loss." *Id.* at 29.

Rather, the Court required the state to demonstrate that abrogating the particular bond covenant was "necessary to achievement of the plan." *Id.* at 29. It ruled that the state failed to meet this least restrictive alternative standard because, "without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit." *Id.* at 30.

The Court also held that abrogation of the covenant failed to satisfy the additional requirement that the harm that the state sought to eliminate was not foreseeable when the contract was entered. Although an unforeseen national energy crisis had subsequently intervened, the Court noted that concerns about energy were "not unknown" at the time of the contract, and subsequent exacerbation of those concerns "were of degree and not of kind." *Id.* at 32.

The quote from *Lynch* on which petitioners rely illustrates precisely this point. Pet. Br. at 43. What the Court actually said in *Lynch* was that the United States had made no showing of "*supervening conditions* which *authorized* Congress to abrogate *these* contracts in the exercise of its police or any other power." *Lynch*, 292 U.S. at 580

Thus, while the Fifth Amendment may be less restrictive on the federal government than is the Contract Clause on the states with respect to the private sector, the Due Process Clause imposes a more onerous standard on the federal government with respect to its own contracts.

(emphasis added). Thus *Lynch*, like *United States Trust*, simply hypothesizes a situation in which unforeseeable "supervening conditions" arising after the formation of the contract converted the contract into a public safety threat which the government had a paramount purpose in eliminating. As the Court noted, in the Great Depression, "economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress." *Lynch*, 292 U.S. at 580. While this explanation was sufficient to justify Congress' imposition of a burden on those without binding contracts with the government, it was wholly insufficient with respect to those who had such commitments.[18]

Application of this principle in *Perry* is clearer still. Concluding that the challenged statute, which provided that debts and obligations could be discharged through payment of legal tender rather than through payment in gold, significantly advanced Congress' paramount power of regulating the value of money and commerce, the Court held in *Perry's* companion case that this power justified invalidating gold clauses in private contracts. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935). *Perry* nevertheless held that the paramount power to regulate the gold supply did not empower Congress to abrogate gold clauses in its own contracts. The "right to make binding obligations is a competence attaching to sovereignty," and, having used this power to create obligations, Congress could not invoke the same "authority to alter or destroy those obligations." *Perry*, 294 U.S. at 353-55.

Viewed in this light, while the feeble public purposes advanced by petitioners may explain their actions here,

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[18] *See also Larionoff*, 533 F.2d at 1191 (Legitimate paramount power "to raise and support armies' and to make rules for the government and regulation of the land and naval forces" was not sufficient to justify "a change in the terms of already binding extension agreements.").

they cannot excuse those actions. Whatever perceived purpose or power that may justify petitioners' breach here, it pales when compared to reducing expenditures and stabilizing financial markets during the Depression, reducing automobile use during an energy crisis, and exercising plenary authority over military personnel.

3. It is important to note that respondents' participation in the Section 8 program, unlike the States' actions in *POSSE*, could not have been accomplished absent respondents' voluntary assent to the contractual arrangements. In other words, under no reasonable understanding of the spending or commerce powers could Congress have singled out respondents and forced them to participate in the program.[19] That being so, preventing petitioners from breaching their commitment hardly *circumscribes* any sovereign power. Instead, permitting petitioners unilaterally to abrogate their contracts without liability not only would deprive respondents of the benefit of their bargains, it would also enable petitioners to accomplish through broken promises that which they could not have required through straightforward legislation. Petitioners simply cannot assert any legitimate, let alone important, interest in so *expanding* their constitutional authority through deceptive measures.[20]

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[19] *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[20] This point is made clear by the Court's decision in *Pennhurst, supra*. In holding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," the Court reasoned:

C. Whatever The Government's Ability To Avoid Having To Specifically Perform Its Contractual Commitments, It May Not Breach Such Commitments Without Incurring Liability.

Finally, *amici* wish to stress that no matter what conclusions the Court might reach with respect to the ability of respondents to prohibit petitioners from acting in violation of their contractual obligations, they may *not* avoid monetary liability for the consequences of any such breach. It is one matter to determine, under substantive due process principles, whether the right of a private individual to compel the government to *perform* its contractual undertakings outweighs the public interest in allowing Congress flexibility to reverse course and address newly-perceived public problems. This due process analysis does not dictate whether, under contract and Taking Clause principles, the right of a private individual to compensation for financial harm caused by the government's repudiation of a contractual commitment outweighs the government's naked desire to shift the financial burden of general regulatory policies from itself to private individuals who took the government at its word. Shifting the cost of public programs to private

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> Unlike legislation enacted under [section] 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract" . . . . Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or "retroactive" conditions.

451 U.S. at 17, 25.

hands, unlike maintaining legislative flexibility, is not a legitimate public interest. To the contrary, it is irreconcilable with the fundamental tenets of contract law and the core principle underlying the Taking Clause.[21]

In short, the question of what remedies are available for a government breach of contract is distinct from the question of whether a private citizen had a contract with the government in the first place. Whatever relevance petitioners' discussion of the ability to foreclose "Congress's right to enact legislation," Pet. Br. at 32, might have with respect to the former question, it is not implicated by the latter question.

Well-established judicial precedent supports this distinction, as it has been squarely held that contractors are entitled to damages for the financial harm of a government breach. Indeed, even when the government's contractual promises of performance cannot be enforced – for example, because they were illegal or unauthorized at their formation – the benefits conferred and costs incurred by a private party in reliance on those promises must be reimbursed, either by application of a *quantum*

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[21] *See First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 319 (1987), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (purpose of Taking Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). *See also Winstar Corp.*, 25 Cl. Ct. at 549:

> [T]he government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment . . . , it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

meruit or *quantum valebant* analysis, or through a broader effort to put the parties "substantially in the position they would have occupied without the attempted contract." *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271, 276 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957). *See Clark v. United States*, 95 U.S. 539, 542 (1877) ("[w]here a parol contract has been wholly or partially executed on one side, the party performing . . . will be entitled to recover such value as upon an implied contract for a quantum meruit.").[22] Thus, it is well-settled that the government cannot retain the benefits of a contract that has been performed by the private contractor, and at the same time repudiate without liability its own obligations. Indeed, this Court has made clear that even with respect to private contracts, the mere fact that a subsequently enacted federal statute precludes "specific performance" of the contracts "by no means [establishes] that [a promisor] could refuse to make just compensation in money for the unpaid balance" of the plaintiff's performance under the contract. *New York Central & Hudson River R.R. v. Gray*, 239 U.S. 583, 586-87 (1916).[23]

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[22] *See also Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963) ("Even though a contract be unenforceable against the Government, . . . the Government [must] pay for goods delivered or services rendered and accepted under it."); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 293 (1990); *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (government must return value of benefits received, on *quantum valebant* or *quantum meruit* basis, under contract that was properly terminated by the government for illegality); *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 560 (Ct. Cl. 1978).

[23] *See also* Story, *Commentaries*, § 1379 (recognizing "distinction between the obligation of a contract, and a remedy upon it . . . ").

It is unclear to *amici* whether these analytical distinctions between an action to enforce a contract and an action for money damages based upon its breach or some other like theory compel a different result in the case at bar, where respondents are simply trying to obtain payment of money due them under their leases. It may well be, however, that in other cases this distinction may make a very real difference, and the Court should therefore keep this distinction in mind when considering the issues presented in this case.

CONCLUSION

For the foregoing reasons, should the Court reach the constitutional issues presented in this case, it should affirm the decision of the Court of Appeals of the Ninth Circuit and hold that petitioners' actions unconstitutionally abrogate respondents' contracts.

Dated: February 8, 1993 Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,

Petitioners,

vs.

ALPINE RIDGE GROUP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL LEASED HOUSING ASSOCIATION AND OTHER ENTITIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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APPENDIX

Appendix A 1a

No. 92-551

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL LEASED HOUSING ASSOCIATION AND OTHER ENTITIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The interest of the National Association of Home Builders, the National Leased Housing Association, and the other entities in this case is as follows:

1. The amici curiae are: (1) The National Association of Home Builders ("NAHB"), which represents almost 160,000 member firms, with an estimated 25,000 members involved in the multifamily housing industry, and a substantial number of these multifamily members participate in the housing subsidy program authorized by Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f) ("Section 8"); (2) the National Leased Housing Association ("NLHA"), which represents over 600 public and private owners of projects that are assisted under Section 8; and (3) 249 entities[1] who are members of NLHA and who own and/or operate apartment projects and have entered into Housing Assistance Payments Contracts ("HAP Contracts") with the Department of Housing and Urban Development, pursuant to Section 8. The NLHA and a majority of the 249 entities are appellants in an action pending before the United States Court of Appeals for the Federal Circuit, *National Leased Housing Association v. United States*, 22 Cl. Ct. 649 (1991), *appeal pending*, No. 92-5064 (Fed.Cir.)[2] who seek to recover the unpaid portion of rent adjustments which, they contend, they are entitled to receive under the HAP Contracts.

2. The Amici have a vital interest in the outcome of this litigation — consideration of the validity of the Ninth Circuit's decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992) will undoubtedly involve analysis of a prior decision of the Ninth Circuit, *Rainier View Assocs. v. U.S. Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), which addressed the method by

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1. The Amici are listed individually in Appendix A to this Brief.

2. The remainder of the entities are subject to a stay entered in *National Leased Housing Association v. United States*, pending resolution of the appeal.. An additional action, *Athens Gardens Ltd v. United States*, No. 91-1181C (Claims Court), was filed in June 1991 and was stayed pending the outcome of the *National Leased Housing Association* action.

which HUD may calculate rent adjustments under the HAP Contracts. The Amici support the affirmance of the *Alpine Ridge* decision.

3. In addition to achieving the just result in the aforementioned litigation, the Amici (all of whom are engaged in building or operating low income housing pursuant to contracts with the United States) have a vital interest in assuring that the Government honor its contracts with the private sector. Without this assurance, the public-private partnership structure that has accounted for virtually all Government assisted low income housing during the past quarter century will assuredly crumble.

4. The Amici have obtained the consent of the Petitioner and Respondents to the filing of this brief and have filed the consents with the Court.

SUMMARY OF ARGUMENT

The Amici urge the Court to affirm the Ninth Circuit's decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992), which held that Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 100-628, 105 Stat. 2057 ("Section 801") is unconstitutional. We do not seek to restate the position of the Respondents. We instead offer the Court our particular position in support of the *Alpine Ridge* decision.

Owners expected to receive certain rent payments in exchange for operating affordable housing. These rent payments consisted of rents received from low-income tenants, based on their income, and on a subsidy from the Government. The rent payments would be adjusted through Automatic Annual Adjustment Factors ("AAAFs"), though the tenant portion of the payment was limited to a percentage of tenant income. This expectation was agreed to

through the Housing Assistance Payment Contracts ("HAP Contracts"), which project owners signed with the U.S. Department of Housing and Urban Development ("HUD"). However, HUD disregarded the HAP Contracts, and project owners' contract rights, and haphazardly adjusted the HAP Contract rent payments through project-by-project comparability studies. HUD's pretext premise for these studies was that owners should receive rents comparable to those being charged on similar units not receiving government assistance. While the Amici do not dispute that the HAP Contract rents should meet such comparability limits as exist in Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f), what HUD calls comparability studies do not result in comparable rent adjustments, nor do they comply with the requirement that HUD use the AAAF.

When the Ninth Circuit restored the contract rights of owners, in its decision in *Rainier View Assocs. v. Department of Housing and Urban Development*, 848 F.2d 988 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), Section 801 was enacted to, among other things, nullify that decision, and undo the justice provided by the courts. Section 801 limits project owners to only 30 percent of what their HAP Contracts provide. The Amici urge the Court to restore the integrity of the HAP Contracts.

ARGUMENT

1. *The Housing Assistance Payment Contract.* Owners executed Housing Assistance Payment Contracts ("HAP Contracts") with the Government, through the U.S. Department of Housing and Urban Development ("HUD") so that they could receive annual payments in exchange for operating housing for low and moderate income persons. These payments would fill the gap between what tenants could pay for rent and what owners needed in order to operate their properties.

HUD's authority to execute the standard form HAP Contracts stems from Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f) ("Section 8"), which gave HUD a choice of two alternative methods to calculate project-owners' rental increases: HUD could (1) use a market survey or appraisal which determines the *amount* being charged in the applicable market for comparable housing, such as project-by-project comparability studies to determine fair market rentals; or (2) utilize a *formula*, the AAAFs, which determines the *percentage increase* in rents in the appropriate area to take comparability into account in a collective way. *Rainier View*, 848 F.2d at 991. HUD chose to utilize the AAAF's as the basis for rent increases by including Paragraph 1.9(b)(2) in the HAP Contracts, providing for annual adjustment of rents using AAAFs.

The pertinent provision of the HAP Contract in which this choice was exercised was Section 1.9, which states:

> a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with the Contract Rent adjustments under this Section . . .
>
> b. *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where

utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, *the Contract Rents shall be adiusted by applying the applicable Automatic Annual Adiustment Factor most recently Published by the Government.* Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no such case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract. (emphasis added)

* * *

d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

The applicable regulation on the rent increase mechanism, 24 C.F.R. § 880.110 (1977), is virtually identical to the HAP Contract provisions. Pursuant to the terms of the HAP Contracts, and the regulations, HUD initially makes annual rent adjustments for Section 8 projects by reference to the AAAFs determined by HUD

and published annually in the Federal Register. 24 C.F.R. § 888.202. The AAAFs vary depending upon the location, size, and rent range of the unit in question, and also whether or not the rent includes all, some or no utility expense. 24 C.F.R. § 888.203(a). The rent adjustments pursuant to the AAAFs are limited by the overall limitation that rent payments for assisted units and comparable unassisted units may not be materially different.

Owners understood that the AAAF process would be utilized, in order to avoid certain pitfalls of previous government programs. The historic Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.*, which enacted Section 8, initiated an entirely new effort to provide decent rental housing for low income Americans, replacing prior efforts to assist privately-owned low income rental housing. In enacting the new Section 8 program, Congress "accepted the essence of HUD's recommendation which is to give private developers the incentive for profit and the risk of loss in the construction and management of housing developed for low income families." S. Rep. No. 693, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Admin. News, 4273, 4314. This program was intended to, and did in fact create, a public-private partnership between the Federal Government and private developers and managers.

The differences between the two programs become more pronounced on the crucial subject of rent escalation, a matter of overriding importance to project owners in the inflationary era of the mid-1970s. Under the cost-based Section 236 program that was being utilized just prior to the Section 8 program, the owner had to justify to HUD on a project-by-project basis the need for an annual rent increase to the tenants based on increased operating expenses.[3] HUD's delay in making rent adjustments resulted in deferred

3. The Section 236 program was enacted in 1968 as Section 236 of the National Housing Act (12 U.S.C. § 1715z-1).

maintenance, cuts in services and ultimately defaulted mortgages. Under Section 8, by contrast, HUD was given the choice to increase rents by either a project-by-project market study of the "fair market rentals established in the housing area" or "on the basis of a reasonable formula". 42 U.S.C. § 1437f. In view of the unpopularity with developers of the project-by-project analysis that marked the Section 236 program, HUD chose to utilize a "reasonable formula", which was the AAAF, as set forth in the HAP Contract. This choice made the Section 8 program popular with developers, as it obviated the need for annual HUD review. *See, e.g.*, Declaration of Jona Goldrich ¶ 3, Joint Appendix at 36.

HUD initially utilized the AAAFs in compliance with the HAP Contracts. In May of 1978, HUD issued what appears to be its first instructions concerning the statutory and contractual command that Section 8 rents be comparable to market rents. These instructions, contained in the Section 8 Housing Assistance Payments Program New Construction Processing Handbook No. 7420.1, state that revision of the AAAF is the correct method of adjusting rents for achieving comparability:

> Pursuant to Section 880.110(d) the AHM [Assisted Housing Management] Branch or the PHA [Public Housing Agency], shall review the accuracy of the rent adjustment to ensure that it is comparable (neither too high nor too low) in relationship to similar assisted or unassisted units. If the adjustment is not comparable, the AHM Branch shall revise the factor in accordance with the revision procedures in paragraph 7-8c(2) and (3).

Consistent with the approach of the 1978 Handbook, HUD regulations provided that HUD field offices may "consider" establishing a separate or revised AAAF for any area in which the

application of the AAAF results in contract rents that are "substantially lower" than rents charged for comparable unassisted units in the area to which the AAAF applies, or part thereof, if the "costs of operating comparable rental housing have increased at a greater rate than the [AAAF]." 24 C.F.R. § 888.204.

Beginning in about 1981, HUD instituted a new approach to enforce the comparability limitation provided for in Section 8 and the HAP Contract, through project-by-project comparability studies. The Government has erroneously argued that the Overall Limitation provision in Section 1.9(d) of the HAP Contract permitted such independent studies. Such studies purport to compare the rent charged for the assisted units with rents charged for unassisted units deemed by HUD to be "comparable." However, HUD failed to provide guidance on how to conduct such studies, as the District Court in *Rainier View Associates v. United States*, W.D. Wa. Order Jan. 15, 1986, found. Even Congress found HUD's practice of conducting project-by-project reviews to be "capricious," and performed "on an ad hoc and arbitrary basis." H.R. Rep. 122, 100th Cong. 1st Sess. 32 (1987), *reprinted in* 1987 U.S. Code Cong. & Admin. News, 3317, 3348.

Accordingly, with this history it is clear that project owners expected to have their payments adjusted through the AAAF process. This process provided a reasonable and administratively simple process in lieu of project-by-project reviews. HUD's departure from contractually bargained for AAAFs creates a great disincentive for private persons to work with the Government in providing services .

Because the project-by-project reviews violate the HAP Contracts, we take exception to the contentions of the Government contained in the Brief of the Petitioners, and of the American Federation of Labor and Congress of Industrial Organizations ("AFLCIO") in its Amicus Brief, filed in the instant action. The

Government and the AFL-CIO contend that project owners have no contract rights in the AAAF payment increases above the project-by-project comparability studies, because any payments above what these project-by-project studies permit must not be comparable to rents received by unassisted tenants, constituting a windfall. The Government argues that without the so-called independent project-by-project comparability tests, owners will receive windfall payments in excess of rents received by comparable unassisted units. Brief of Petitioner at 30. This disingenuousness is matched by the AFL-CI0, which in its brief, states that "what respondents seek here is not constitutional protection for their reasonable contract-based expectations. Rather, respondents seek for themselves the same windfall that the remedy in *Rainier View* created for the project owners in that case." AFL-CIO Amicus Brief at 13.

However, the Government's position that without an independent project-by-project comparability to directly adjust rents, the AAAFs were not or could not be comparable is completely erroneous. We dispute that the project-by-project studies have been either an appropriate or reliable method for determining such comparability. Indeed, HUD chose to follow the AAAF method with comparability a part of that method. Moreover, there is absolutely no evidence that utilizing AAAFs creates windfalls. Therefore, the AFL-CIO's comments are unwarranted, and based on the unsound assumption that owners seek windfall profits.

2. *Section 801 is Unconstitutional.* After the Ninth Circuit ruled in *Rainier View*, 848 F.2d at 988, affirming property owners' rights under the Due Process Clause to have their HAP Contracts correctly administered with AAAFs, Congress took it upon itself to unilaterally change the terms of the HAP Contracts by passing Section 801. However, Section 801 is nothing more than an unconstitutional abrogation of a solemn federal commitment in

violation of the Due Process Clause of the Fifth Amendment, and therefore is a nullity. U.S. Const., Amend. V. *See Alpine Ridge*, 955 F.2d at 1387 (9th Cir. 1992).

Section 801 provides that HUD must make retroactive payments for past rents denied under the project-by-project comparability studies, only to the extent that such rents generally equal about 30 percent of the AAAF adjusted rents to which owners are entitled under the HAP Contract. It does this by establishing a new formula as the "exclusive method" for calculating the amount of rent due the owners of Section 8 projects. Instead of the contract rent being multiplied by the AAAF, as it was before Section 801, to ascertain retroactive damages, only the project's operating expenses (contract rent not including debt service) are multiplied by the AAAF, with the minimum payment equal to 30 percent of what the owner would otherwise have received. Because, in virtually all cases debt service is a very substantial component of the contract rent, the 1989 Act assures *ab initio* that no project owner will obtain the full amount of the rental adjustments to which he is entitled. In fact, because of the way the debt service adjustment is calculated, in most cases, the "30 percent solution" will service as a ceiling, rather than a floor, to recovery.

Congress' sole motivation in enacting Section 801, and limiting recovery of payments under the HAP Contracts by some 70 percent, was to save money, as the legislative history of Section 801 demonstrates. For example, Senator D'Amato, a cosponsor of the legislation containing Section 801, and an advocate of HUD's new rent adjustment formula, said that "[w]ithout a legislative remedy, the Federal Government would have been forced [as a result of the *Rainier* decision] to pay over $600 million," to project owners, based on the original HAP Contracts, and that Section 801 "reduces this loss to $210 million — a savings of over $390 million." 135 Cong. Rec. S16608 (Daily Ed. Nov. 21, 1989) (Statement of Sen. D'Amato). The section-by-section analysis that

accompanied the Senate bill noted that compliance with the contract would cost $600 million to $1 billion nationwide, whereas the "retroactive solution" would cost only $210 million. 135 Cong. Rec. S16600 (Daily Ed. Nov. 21, 1989). Similarly, recognizing legislative legerdemain when he saw it, Senator Sasser saluted Section 801 as a "fix" that "could save the Federal government hundreds of millions of dollars if not more than a billion dollars." 135 Cong. Rec. S16607 (Daily Ed. Nov. 21, 1989) (Statement of Sen. Sasser). Congressman Wylie, ranking Republican on the House Banking, Finance and Urban Affairs Committee, stated that Section 801 "will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million." 135 Cong. Rec. H9690 (Daily Ed. Nov. 21, 1989) (Statement of Rep. Wylie). Chairman Gonzalez supported Section 801 because "if Congress did not act on this matter, the potential liability for the government would amount to $2.1 billion over 10 years . . ." 135 Cong. Rec. H9686 (Daily Ed. Nov. 21, 1989) (Statement of Rep. Gonzalez).

Faced with this history, the Ninth Circuit had little difficulty in striking down the Government's repudiation of its contractual obligations. Stated succinctly, the court found that "Congress unconstitutionally abrogated the owners' vested right in order to save money". *Alpine Ridge*, 955 F.2d at 1387. In effect, the Ninth Circuit found the Government no better than a playground bully, using its legislative muscle to force owners to accept less than they were promised.

The two leading decisions preventing the Government from abrogating its contracts at will are *Lynch v. United States*, 292 U.S. 571 (1934) and *Perry v. United States*, 294 U.S. 330 (1935). Both depression era cases examined laws designed to save the Government money in a tight economy at the expense of vested contract rights. *Lynch* held that Congress' attempt to reduce expenditures by canceling its obligation to pay insurance benefits was prohibited by the due process clause. 292 U.S. at 579. In *Perry*,

Congress was similarly barred from refusing to pay its debt on certain bonds in gold coin, as promised, and instead trying to pay the debt on such bonds with legal tender, that is, dollars. 294 U.S. at 349. As with *Lynch* and *Perry*, the Government's abrogation of owners' HAP Contracts in the instant case is simply an attempt to avoid the contractual obligations it has to the property owners with whom it contracts. The *Lynch* and *Perry* principal was affirmed in *Bowen v. United States*, 477 U.S. at 55: "Congress does not have the power to repudiate its own debts . . . simply in order to save money".[4] The Amici ask this Court to enforce the law as laid down by the Constitution and prohibit the unilateral abrogation of the HAP Contracts. Salvation of the sanctity of the contract will restore confidence in private citizens to work with the Government when it calls on them to help fulfill a socially significant need, such as providing housing for low income persons.

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4. The Ninth Circuit rejected the Government's argument that it must undertake a balancing exercise to determine whether there was a rational basis for the Government's action. *Alpine Ridge*, 955 F.2d at 1387. The Ninth Circuit did not determine what test to use. We submit that when federal legislation interferes with rights provided for in contracts to which the Federal Government is a party, the special circumstances of the Federal Government's taking legislative action, which impairs a contract to which it is a party justifies stricter scrutiny under the Due Process Clause than that applied to ordinary economic and social legislation. *Peick v. Pension Benefit Guarantee Corporation*, 724 F. 2d 1247, 1264 n.22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). The standard of scrutiny is heightened still further when the action complained of is "primarily concerned with reducing governmental expenditures," *Larionoff v. United States*, 533 F.2d 1167, 1180 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977). Simply put, when the government abrogates its own contracts, due process cannot be satisfied merely by showing that the Government had some rational basis for the action. *See United States Trust Co.*, 431 U.S. 1, 26, n.25 (1977). In any event, we believe that since the Government's sole purpose in enacting Section 801 was to save itself money, it violates due process regardless of whether the Court requires such strict scrutiny, since there is no basis upon which Section 801 can be justified.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief for Respondents, the decision of the United States Court of Appeals for the Ninth Circuit in this case should be affirmed.

Respectfully submitted,

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APPENDIX A

Parties to the NLHA Action on Appeal

Alameda Terrace, Ltd.
Alturas de Senorial Associates
Ashbrooke Apts. Ltd.
Barbour County Apts. Ltd.
Beacon Hill Limited Partnership Community Management Corp.
Bellefontaine Gardens, Ltd. Bethesda Corp.
Birchwood Gardens, Ltd.
Bramblewood, A Utah Limited Partnership
Brandywood Acres Limited Partnership
Brent Gardens, Ltd.
Briarcliff Manor Limited Partnership
Brookside Hills Limited Partnership
Bulldogger Apartments
Burrell T. Davis
Cahaba Apartments, Ltd. Camden Way I, Ltd.
Camden Way II, Ltd.
Cedar Rapids Venture
Chaska Partners, Ltd.
Cheyenne Villa Limited Partnership
City Court II Apts., Ltd.
Colinas de San Juan Associates
Columbus Gardens, Ltd.
Cornelius, ALP
Countryside, A Utah Limited Partnership
Covadonga, LDP
Covington Apartments, Ltd.
Creekview Manor, Ltd.
Daleville Manor Co.
Damy-Franklin Realty Trust
Dana A. Patterson, Inc.
Dandridge Towers, Ltd.

Appendix A

Deerfield Apartments, Ltd.
Edward J. Roy Trust
El Verde Associates
Elk Associates
Elmwood Ltd.
Englewood Square, Ltd.
Englewood Village, Ltd.
Escalante III, WRP Limited Partnership
Eufaula Apartments, Ltd.
Fairfield Senior Citizens, Ltd.
Falls Meadowridge Ltd., Partnership
Farmington Court Associates Farrington, Ltd.
Forest Hill Limited Partnership
Forest Park South, Ltd. Forest Park, Ltd.
Four Winds West Company
Gainesville Housing Authority
Gateway, ALP
Gray Hill Limited Partnership Community Management Corp.
Greenwood Apartments
Harriman Gardens, Ltd.
Heflin Apartments, Ltd.
Heritage House, A Utah Limited Partnership
Highland Park Apts. A Texas General Partnership
Hillcrest Apartments Co.
Holly Haven I WRP Limited Partnership
Holly Haven II WRP Limited Partnership
Hollywood Fountain North, A California Limited Partnership
Hollywood Fountain South
I.L. O'Sullivan, Jr.
Ironman Apartments
Jardines De Caparra Associates
Jeffrey Place, Ltd.
Jellico Towers, Ltd.
Kensington Heights, Ltd.

Appendix A

Kimberly Associates
Kingsport Gardens, Ltd.
LaGrange Meadows Limited Partnership
Lansing Gardens, Ltd.
Lebanon Senior Citizens, Ltd.
Liberty Commons, Ltd.
Linden Park, Ltd.
Los Laureles Apts. LDP
Lyndonsville Associates
Lynwood Terrace Company
Marilyn Smith
Marion Manor II Ltd.
Maryville Towers, Ltd.
Memphis Towers, Ltd.
Montserrate Associates
Monte De Oro Associates
Morningside Gardens, Ltd.
Mt. Morgan Ltd.
Murfreesboro Towers, Ltd.
New Center Associates
Normandale Apartments, Ltd.
North Park Apartments, Ltd.
Northcrest, Ltd.
Northwood Park, Ltd.
Oakwood Apartments
Overbrooke Hills, Ltd.
Owensville Commons, Ltd.
Ozark Manor Co.
Pam Apartments Associates
Park Place Associates
Parkwood Apartments Partnership
Parkwood Apartments Partnership Phase II
Pattern Towers, Ltd.
Peppertree Apts. Ltd.

Appendix A

Piqua Manor, Ltd.
Plaza Manor, A Limited Partnership
Prattwood Apartments Co.
Preston Drive Limited Partnership
Rainbow Apartments
Ramsay II Associates
Richard Roy
Rickwood, Ltd.
River Oaks Associates
Riverside Associates
Roosevelt Manor, Ltd.
San Anton Associates
Selma Apartments Co.
Socorro Village Apartments
South Park, Ltd.
Southeastern Partners, Inc.
Southern Development Co. of Andalusia, Ltd.
Southern Development Co. of Moulton, Ltd.
Southern Development Co. of Oneonta, Ltd.
Southern Development Co. of Oneonta No. 2, Ltd.
Southern Development Co. of Piedmont, Ltd.
Southern Development Co. of Sylacauga, Ltd.
Southwood Gardens, Ltd.
Spring Hill Limited Partnership Community Management Corp.
St. Charles, Ltd.
Stanley Square, A Limited Partnership
Staunton Commons, II, Ltd.
Stone Hill Limited Partnership Community Management Corp.
Stonehedge II, A Utah Limited Partnership
Stonehedge, WRP Limited Partnership
Stonewood Apts. Ltd.
Streetsboro Green, an Ohio Limited Partnership
Summit Towers, Ltd.
Suncook Pond Associates

Appendix A

Sundance Apartments Associates
Sunset Square, Ltd.
Swansboro Hill Limited Partnership Community Mgmt. Corp.
Tamarind Square, Ltd.
Tanglewood Apartments, Ltd.
Tera Gardens, ALP
The Charlestown Group
The Heights, LDP
The Hillsborough Group
The Housing Authority of the City of Allentown Pennsylvania
The Sussex Group
The Watauga Company
Torre De Tokio Ltd., Div. Partnership
Troy Manor, Ltd.
Turabo Limited Dividend Partnership
Valley View Associates
Vandalia Associates, Ltd.
Vega Baja LDP
Victoria Arms Apartments, Ltd.
Villa Park, Ltd.
Village East Associates
Village II, WRP Limited Partnership
Village Park, Ltd.
WAD Company
Washington Gardens Association
West Columbia Apartments Associates
Western Gardens Associates, A California Limited Partnership
Westgreen Limited Partnership
Westwood Arms, A Limited Partnership
Westwood Village Apartments, A Texas General Partnership
William Henry Waldock
Willow Creek, Ltd.
Willowood Investment, A Utah Limited Partnership
Wilshire Apts., A Limited Partnership

Appendix A

Windwood II Company
Windhaven Associates
York Apartments Company

Parties to the NLHA Action who are Stayed in Claims Court Pending Appeal

National Leased Housing Association
ADA Associates
Baldwin Villa Plaza
Beechcreek Ltd. (The Southcreek Company)
Blackduck Apartments
Cambridge Square, Ltd.
Casa Linda Del Sur Associates
Clinton Towers Ltd.
Detroit Lakes Park Manor Estates Ltd. Partnership
El Nido Apartments
Elmwood Apartments Ltd.
Eminence Village, Ltd.
Floodwood Associates
Gatewood Village Apartments
Glenbrook Park, Ltd.
Greentree, Ltd.
Greentree Village
Henry Hill Apartments Ltd.
Hillside Terrace
Housing Associates of Lancaster
Hunt Building Corporation
Indian Ridge Ltd.
Jackson Valley Ltd.
Lintero Apartments
Madison Hill Limited Partnership
Maple Grove, Ltd.
Mill Ponds View Apts.

Appendix A

Montgomery Manor Apartments
North Star Apartments
Northgate Village Apartments
Peppertree Acres Apartments
Pine Hill Partnership
Pine Ridge Apartments
Prall Place, Ltd.
Princeton Apartments
Red Pines Estates
Regency Park, Ltd.
Regency Park of Louisville, Ltd.
Reynolds Woodlawn Apts.
River Bend Apts, Ltd.
Riverside Manor
Robinwood Park
Sagebrush Apartments
Southside Manor
Springview Partnership
Sunnyview Square
Sunset-Normandie Towers, Ltd.
Sycamore Terrace, Ltd.
The Maryland Ltd. Partnership
The Oaks
Thief River Falls Elderly
Walnut Hill Ltd.
Westwood Ltd.
Whittier Apts. Ltd.
Wildwood Apts. Ltd.
Williamsburg Terrace, Ltd.
Windsor Place Partnership, Ltd.
Woodside Park, Ltd.
Jose Antonio Escajeda Apartments
College Manor, Ltd.
Sierra Vista Apartments

Appendix A

Bremerton Limited
Burnsville Partners Ltd.
Central Towers Limited
Clifton Limited
Coventry Associates
Fridley Apartments
Heritage Hill II
Innsbruck Limited Partnership
Northgate Plaza Ltd.
The Hylands Limited
West Falls Estates
Windsor Place, Ltd.
Zumbrota Towers Limited
Park View Terrace Apartments
Mt. Carmel Housing Partnership
Allison Village Associates
Uptown Village, Ltd.
Village East Towers

(14)

Supreme Court, U.S.
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No. 92-551

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,
Petitioners,

v.

ALPINE RIDGE GROUP, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF SOUTHWIND ACRES ASSOCIATES, SOUTHGATE VILLAGE APARTMENTS AND OTHER CLASS MEMBERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF OF SOUTHWIND ACRES ASSOCIATES, SOUTHGATE VILLAGE APARTMENTS AND OTHER CLASS MEMBERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Southwind Acres Associates and Southgate Village Apartments are owners of housing projects which fall under Section 8 of the United States Housing Act of 1937 as amended, 42 U.S.C. §1437(f) ("Section 8"). These limited partnerships are plaintiffs in an action pending in the United States District

Court for the Eastern District of Oklahoma styled Southwind Acres Associates, a Limited Partnership; and Southgate Village Apartments, a Limited Partnership, Plaintiffs vs. Jack F. Kemp, et al., (HUD), Defendants, Case No. CIV-91-125-C. The issues involved in this action are identical to those in this appeal, challenging the constitutionality of Section 801 of the National Housing Act. This action is stayed pending this appeal. The remaining Amici Curiae (identified in Appendix "A") are Section 8 project owners with projects located throughout the United States, in judicial districts in addition to the Ninth Circuit, represented by the same co-counsel for Southwind Acres Associates and Southgate Village Apartments in the Eastern District of Oklahoma. Further, the additional Amici Curiae are members of the class and group of plaintiffs in

that certain class action pending in the United States District Court for the District of Nebraska styled Federal Housing Partners IV Limited Partnership, an Iowa Limited Partnership, et al., Plaintiffs vs. Jack Kemp, Secretary of the United States Department of Housing and Urban Development, et al., Defendants, Civil Action No. 89-0-812. This action is also stayed pending this appeal.

The Amici Curiae have a strong interest in the issue of the constitutionality of Section 801 of the National Housing Act because the resolution of this issue will determine their contract rights pursuant to their Housing Assistance Payment Contracts with HUD.

SUMMARY OF ARGUMENT

1. Pursuant to Section 8 of the National Housing Act, private developers contracted with HUD to construct unique housing which would only be viable through HUD's subsidization of the rent the tenants were able to pay. To induce the developers to construct the projects, HUD included provisions in their Contracts with the developers which would protect the owners from future economic uncertainties. HUD promised to adjust the rents in the projects in accordance with published rent adjustment factors promulgated by HUD.

2. Although HUD was statutorily empowered to use either "fair market rental" adjustments or adjustments based on published factors, HUD contracted to use the objective, hassle-free factor adjustments for which the project owners bargained. From 1974 through 1980, HUD

adjusted the contract rents through the use of the Automatic Annual Adjustment Factors just as both parties had intended and contracted.

3. When HUD and Section 8 project owners entered into HAP Contracts in 1974, all parties bargained for and intended that the rents would be adjusted based on Automatic Annual Adjustment Factors, which would be published at least annually in the Federal Register. The Automatic Annual Adjustment Factors would be the sole means for determining rent adjustments. However, after a period of seven (7) years, HUD unilaterally amended the terms of the contract by using comparability studies as an independent method of determining rent adjustments, thereby abandoning the agreed upon formula as the sole means of adjusting contract rents. HUD had no authority to unilaterally amend the

contracts by imposing additional methods of adjusting contract rents.

4. The court in Rainier View Associates v. United States Department of Housing and Urban Development, 848 F.2d 988 (9th Cir. 1988) cert. denied, 490 U.S. 1066 (1989), properly interpreted the HAP Contracts as the parties intended when they were executed. HUD elected the option to adjust the rents based on a reasonable, published formula and incorporated this option into the form contract which it drafted. Rainier View's interpretation of section 1.9(d), the overall limitation provision of the contract, was proper and must not be disturbed. It found that Section 1.9(d) did not give HUD the authority to adjust the contract rents by unilaterally imposing comparability studies as one of the means to determine the rent. The interpretation of the overall limitation

provision which HUD urges this Court to adopt completely ignores the intent of the parties which existed when they entered into HAP Contracts in 1974.

5. Section 801 of the Housing Reform Act, 42 U.S.C. 1437f(c)(2)(C) (Supp. II, 1990), passed at the request of HUD, was enacted to save the Government money after the court in, Rainier View, declared that HUD's use of comparability studies as an independent basis to determine contract rents was contrary to the intent and bargained for terms of the HAP Contracts. The Alpine Ridge Group, et al. v. Jack F. Kemp, 955 F.2d 1382 (9th Cir. 1992), holding that Section 801 is unconstitutional, as it alters, retroactively and prospectively, agreed upon and bargained for contract obligations of HUD merely to save money is proper and should not be disturbed. That holding is consistent with Lynch v.

United States, 292 U.S. 571 (1934), which held that Congress cannot abrogate contractual obligations of the Government simply to save money. Since the sole reason for Section 801 was to save money, it must be held unconstitutional and the decision being reviewed by this Court must be affirmed.

ARGUMENT

1. **The Background.** In 1974, Congress enacted Section 8 of the National Housing Act[1] to induce private developers to build and operate rental housing for elderly, handicapped and poor tenants. HUD sought private developers to design, construct and operate these Section 8 projects. These were risky ventures to the developers, however, and in order to induce developers to participate in the program, HUD gave

[1] 42 U.S.C. §1437(f)

assurances to these owners in their contracts (Housing Assistance Payment or "HAP" Contracts) that the full faith of the federal government stood behind its obligations.[2]

To further convince private developers to participate in these high risk projects, the HAP Contracts provided for automatic annual rent adjustments to be applied to determine contract rents due to the owner from HUD. These adjustment factors were material and critical to the project owner's decision to participate in Section 8 subsidized housing project ventures.

In the Federal Housing Act, Congress provided HUD with two (2) mechanisms for determining rent adjustments, set forth

[2] 1.6 Government Assurances To Owner. The execution of this agreement by the government signifies that the faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to the contract and that funds have been obligated by the government for such payments.

in subsection (c)(2)(A) of Section 8:

> The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units, or if the Secretary determines, on the basis of a reasonable formula. (Emphasis added).

These methods were the only statutorily authorized ways in which HUD could adjust contract rents to be paid to project owners. The term "comparability studies" is absent from the governing Section 8 Statute.

2. **The Parties Intended To Utilize the AAAFs As the Sole Method Of Adjusting Contract Rents.** Based on this statutory authority, HUD could have chosen either of these methodologies to form a part of the bargain when contracting with Section 8 project owners regarding the subject of annual rent adjustments. HUD chose the

latter of the two (2) options presented by subsection (c)(2)(A), that of a reasonable formula. This reasonable formula approach, chosen and standardized by HUD, became the Automatic Annual Adjustment Factors (AAAFs) found in Section 1.9b of the HAP Contracts, which provides in pertinent part:

> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register....
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Factor most recently published by the Government.

Thus, when project owners were presented with the opportunity to enter

into HAP Contracts drafted by HUD[3] setting forth the basis upon which they would receive annual rent adjustments, these owners relied upon:

> (1) HUD had agreed not to determine annual rent adjustments based on fair market rentals in the housing area for similar types and sizes of dwelling units; and
>
> (2) HUD had agreed to provide automatic rent adjustments by virtue of specific, defined factors which would be published in the Federal Register, at least annually.

HUD marketed the Section 8 program with an emphasis on the fact that rents would be adjusted by use of these published, automatic adjustment factors as opposed to an arbitrary or subjective case-by-case basis.

It has been established by the

[3]Contracts should be construed less favorably against the drafter. United States v. Seckinger, 397 U.S. 203, 210 (1970). This principle applies to the government because of its vast economic resources and stronger bargaining position in contract negotiations. Id., P. 216.

Respondents in this case, and it is also true for amici curiae, that their decision to undertake Section 8 project construction, maintenance and operation was based in major part on the manner in which their contract rents were to be adjusted. These parties relied on the representations of the Government and the language of the HAP Contracts themselves, both of which stated to these project owners that their rents would be determined by use of AAAFs, in reaching their decision to enter into Section 8 construction projects and contracts.

In addition to the project owners' intent and belief that the contract rents were to be adjusted by AAAFs, from 1974 to 1981 HUD adjusted contract rents in this manner. At the inception of this program, HUD apparently had neither intention nor belief that the use of "comparability studies" or other outside

or subjective factors would come into play to alter or determine contract rents.

HUD's construction of the applicable provisions of the HAP Contracts was the same as the project owners. This fact is evidenced by:

> (1) The strongest indication of what the parties actually bargained for in Section 1.9 of the HAP Contracts, is that HUD did in fact determine and adjust contract rents annually by operation of AAAFs from 1974 through 1980. This constitutes a course of performance and dealing between the parties which is the best indicator of what the intention of the parties was with regards to the contract;[4]
>
> (2) HUD specifically stated and represented to prospective Section 8 project owners in marketing the program that this was HUD's understanding of how rents were to be adjusted;
>
> (3) When HUD first amended its form contract, it used the same language formerly found in

[4]Restatement (Second) Contracts §202 comment g.

> section 1.9(b) of the original contracts in its new contracts, codified as section 1.8(b).[5]; and
>
> (4) HUD's own agency regulations in effect at the time provided that contract rents would be determined by use of AAAFs.[6]

For the first seven (7) years of the performance of Section 8 HAP Contracts between the parties there was no indication that HUD's perception of its promises or its intentions with regard to these projects was any different than the

[5]Automatic Annual Adjustments. (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families. (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

[6]24 C.F.R. §888.203(b), 41 Fed. Reg. 49440 (1976).

project owners.

3. **HUD Abandoned Agreed Upon Formula as the Sole Method to Determine Contract Rents.** In 1981, HUD abandoned the AAAFs as the sole method of determining contract rents, by virtue of the utilization of "comparability studies" to place a cap or limitation on rents provided in the HAP Contracts. HUD claims that the use of these comparability studies was authorized to prevent the occurrence or existence of material differences between the rents of Section 8 projects and comparable unassisted units.[7] The jurisdictional papers show that HUD's use of comparability studies, which were not authorized by statute, regulations or the contracts, had far different effects. Rather than simply preventing material

[7]HUD Brief, Page 17.

differences in rents between assisted and unassisted units, HUD's use of comparability studies actually tampered with and eroded the bargained for differences in rents which existed at the time of the contracts between the assisted and unassisted units.[8] For example, the jurisdictional papers show that HUD, and the contracts, recognized that there would be a disparity between the assisted contract rents of the Section 8 project owner and unassisted units in the area. The HAP Contracts, in section 1.9(d), specifically recognize this disparity and prohibit HUD from tampering with or altering this relationship between assisted and unassisted rents over the life of the contracts. Section 1.9(d) provides in pertinent part:

[8]Respondent Alpine Ridge Group Brief, Page 36.

> "This limitation (the overall limitation clause) shall not be construed to prohibit differences in rents between assisted and unassisted units to the extent that such differences may have existed with respect to the initial contract rent."[9]

These provisions of the HAP Contracts, properly harmonized, result in the inescapable conclusion that the provisions were designed to operate in such a manner that the overall limitation provision was not to be imposed as a vehicle to eliminate all differences between unassisted rents and assisted rents in a given area. HUD's use of the comparability studies and the overall limitation provision of section 1.9 violates the intent, spirit and letter of the HAP Contracts.

4. Rainier View Decision Properly Construed Meaning of Contracts And Intent

[9]HAP Contracts, Section 1.9(d).

of Parties. Following HUD's unilateral decision to determine contract rents by utilization of comparability studies as an independent limitation on contract rents, project owners in the Western District of Washington challenged this procedure in the Rainier View case.[10] Regarding the intention of the parties to the HAP Contracts and the meaning of the significant provisions, Rainier View found that:

> (1) The overall limitation provision of Section 1.9(d) is not an independent basis for making annual rent adjustments;
>
> (2) In the HAP Contracts, HUD elected the formula method (AAAFs); and
>
> (3) HUD's utilization of comparability studies to enforce its construction of the overall limitation provision would make all rent adjustments depend on the market survey method, contrary to the language of the contracts

[10]848 F.2d 988 (9th Cir. 1988), cert. denied, 490 U.S. 1066 (1989).

agreed upon by the parties.

Rainier View found that HUD's interpretation of the overall limitation provision of the HAP Contract is contrary to the intention expressed in the contract language itself and the purpose of the overall limitation provision found in HUD's regulations.[11] As found by Rainier View, the proper use of the overall limitation provision and those comparability studies used in conjunction therewith could only be to establish separate AAAFs or revise AAAFs in effect for that particular area. The interpretation of the contract provisions found by Rainier View had as its basis primarily the expressed intention of the parties, based on the factors previously discussed herein. The contract language and the intent of the parties was not to

[11]24 C.F.R. §888.204 (1987).

allow HUD to unilaterally impose additional methods of adjusting rents. The parties did not intend for HUD to abandon the AAAFs, as the sole method of adjusting rents by the use of comparability studies as an independent basis for making rent adjustments. As the Rainier View Court stated, at page 991:

> "that is clear from the contract language and is consistent with the statutory language and HUD's own regulations interpreting the Statute."

5. **Following The Rainier View Decision Congress Enacted Section 801 To Save Money.** The effect of the Rainier View decision upon HUD and upon Congress was great indeed. HUD did not believe that Rainier View was correctly decided.[12] Based on its opinion that Rainier View was wrongly decided, HUD

[12]HUD Brief, Page 8

made the decision not to apply its ruling outside the Ninth Circuit.[13] Section 8 project owners demanded treatment in accordance with the mandate of Rainier View. HUD refused to do so. The prospect of additional litigation and massive payments of unpaid contract rents per the original contract terms loomed large. To avoid the performance of its obligations and to obtain a cure for this problem, HUD sought the assistance of Congress. This assistance was provided by Congress and took the form of Section 801 of the Reform Act.[14] The provisions of Section 801 and its prospective and retrospective aspects are thoroughly discussed in the jurisdictional papers. HUD, in its Brief, describes and

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[13] Id.

[14] Pub.L. No. 101-235, 103 Stat. 2057-2059, (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II, 1990) and 42 U.S.C. 1437 Note (Supp. II, 1990).

characterizes Section 801 as curative legislation enacted for several laudable purposes including: (1) to restore uniform and appropriate procedures to govern rent adjustments; and (2) to ensure a reasonable rate of return to the owners' while effecting the original Congressional objective of avoiding excessive rents and rates of return for Section 8 projects.[15]

HUD asserts that these goals were to be achieved by Section 801 by prescribing new procedures for calculating rent adjustments, both retrospectively and prospectively. While this sounds nice, what HUD fails to focus on is that "new procedures for calculating rent adjustments both retrospectively and prospectively" means that the bargained for and intended provisions of the HAP

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[15] HUD Brief, Page 8.

Contracts were being abrogated in a wholesale fashion which resulted in:

> (1) the deprivation of bargained for contract rights;
>
> (2) payment of rents to Section 8 owners less than bargained for and anticipated; and
>
> (3) discretion and ability in HUD to alter annual contract rents by arbitrary and subjective measures for the duration of the terms of the HAP Contracts.

In reality, as established in the district courts in summary judgment proceedings in both Alpine Ridge[16], and Acacia Villa[17], Congress's enactment of Section 801 was primarily an attempt to save the Government money which it would otherwise have to pay Section 8 project owners to honor the statutory and contract provisions governing HAP Contract rent adjustments. Ample

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[16]764 F.Supp. 1393 (W.D. Wash. 1990).

[17]774 F.Supp. 1240 (C.D. Cal. 1990).

evidence exists that the real purpose of Section 801 was to save Congress money. Senator D'Amato stated that "the Bill reduced the loss to $210 million, a savings of over $390 million".[18] Senator Sasser, Chairman of the Budget Committee, was quoted as saying in the Congressional Record[19], "by moving quickly to enact this legislation with its 'Rainier View fix' we could save the Government hundreds of millions if not more than a billion dollars." The Chairman of the Housing Subcommittee, Representative Gonzalez, illustrated that Section 801 would reduce retroactive costs $210 million and reduce prospective costs to $500 million over the next ten (10) years.[20]

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[18]135 Cong. Rec. S 16602 (November 21, 1989).

[19]135 Cong. Rec. S 16607 (November 21, 1989).

[20]135 Cong. Rec. H 9686 (November 21, 1989).

In contrast to the characterization of Section 801 advanced by HUD in its Brief, these comments aptly illustrate that Section 801 was intended to shift the burden of HUD's use of comparability studies from Congress and the people squarely to the backs of the individual Section 8 project owners whose rents were adjusted by use of these vehicles. For it is clear that if Congress is successful in reducing its rent obligations by virtue of Section 801, Congress will save money it would otherwise be obligated to pay individual project owners under the mandate of Rainier View. Congress intended to save a loss of $2 billion according to Secretary Kemp in a letter to Congress.[21]

Section 801's attempt to save money should not be permitted by this Court for

[21]135 Cong. Rec. H 9688 (November 21, 1989).

a number of reasons. Of primary importance, Section 801 abrogates the intention of the parties and the clear meaning of the contracts. The intention of the contracting parties should always be given the meaning ascribed to the contract by the parties at the time the contract was entered into.[22] The contract has been found to be unambiguous in its meaning in the Rainier View decision. The fact the Congress and HUD disagreed or were unhappy with the Rainier View decision provides no basis for vitiating the parties' intentions upon entering into these contracts. HUD's Brief cites no cases and does not seriously contend that Congress has the power to abrogate its contractual obligations in contracts between the Federal Government and private parties

[22]Williston on Contracts, 3rd Ed. §601 at p. 306.

simply because it disagrees with the ruling of a court or does not enjoy the sting of the obligation. To the contrary, this Court has held in Lynch v. United States,[23] that "Congress was without power to reduce expenses by abrogating contractual obligations of the United States." This Court has also noted in Bowen v. Public Agencies Opposed to Social Security Entrapment,[24] that Congress is without power to repudiate its own debt simply in order to save money. The Lynch and Bowen cases were dispositive of this issue in the Ninth Circuit's opinion in Alpine Ridge.[25] In Alpine Ridge, Section 801 was correctly seen as an attempt to save money rather than true curative legislation as

[23]292 U.S. 571 (1934).

[24]477 U.S. 41, 54-55 (1986).

[25]955 F.2d 1382 (9th Cir. 1992).

follows:

> This is not a case where Congress alters the effect of a court decision by amending a statute. Through section 801, Congress has attempted to change section 8's original meaning retroactively, 14 years after its enactment. The fact that Congress does not recognize its obligation under the contracts as interpreted by Rainier View does not affect the validity of the owners' rights, or Congress's inability to alter them by retroactively amending the underlying statute.
>
> HUD also denies that Congress acted solely to save money. It argues that section 801 was enacted as a compromise to end litigation over the issue of the appropriate method for determining annual section 8 rent adjustments. HUD points to no authority permitting Congress to legislate a compromise to disputes involving vested property rights in order to prevent costly or wasteful litigation. HUD's argument again assumes the absence of any vested property right in annual formula rent adjustments, an issue that we have decided against it.
>
> HUD is unable to present any argument explaining section 801

as anything other than Congress's attempt to save resources and money by legislating a compromise of its disputes with the owners. We hold that these cases fall within the scope of Lynch and Perry, and that through section 801, Congress has attempted to reduce an obligation in order to save money. Although HUD and Congress do not recognize this obligation, it has been established by the final judgment in Rainier View. Therefore, we hold that section 801 unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment.

Since Section 801 was primarily an attempt to save money, it cannot withstand the scrutiny required by this Court and the Constitution for legislation which affects vested constitutional property rights. If Section 801 is allowed to stand, the property rights of Section 8 owners will be materially impaired. HUD characterizes the impairment of Section 8 property owners' rights as something less

than substantial. However, throughout HUD's Brief and other jurisdictional papers, it is apparent that Congress and HUD considered this impairment, in terms of dollars, a subject of great magnitude, ranging between a low of $2 million to a high of $2 billion, as stated by Secretary Kemp. While perhaps on a case-by-case basis the impairment would not be extraordinary in terms of dollars, the overall impairment of Section 8 project owners' property rights over the term of the Contracts by virtue of the Section 801 legislation is monumental indeed.

CONCLUSION

For the reasons stated herein, Amici Curiae submit that the judgment of the Ninth Circuit in these consolidated appeals should be affirmed.

Respectfully submitted.

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Appendix "A"
List of Amici Curiae

United Keetowah Associates, Ltd.; Cape Lacroix, II, A Missouri Limited Partnership; 17th Place Associates, an Illinois Limited Partnership; Cardinal Apartment, Inc.; Crescent Arms Associates; Nowata Gardens Apartments of Chickasha, Oklahoma, Inc.; Western Village Apartments, Ltd; Forest Glen Estates, Inc.; Castle Gardens Charitable Trust; The Atlantis Apartment, Inc.; Clyde B. Goldsmith, Bernard L. Lifshutz; Southwood Patio Homes; Feliciana, a Louisiana Partnership in Commendam; Concordia Limited Partnership; Alouette Limited Partnership; Tangi Village Limited Partnership; 3433 Tulane Ave., a Louisana Partnership in Commendam; Forest Towers, Oklahoma, a California Non-Profit Corporation; College Apartments, Inc.; Yale Village Charitable Trust; Sierra Manor, Inc.; Sunset Towers, Inc.;

Highland Park, Inc.; Gulfway Terrace, Incorporated; Robert W. Green; Hoover & Hoover, Ltd.; Hoover Development, Ltd.; Better Housing, Incorporated; Lipton Properties III, Ltd.; Tower Oaks Partnership; Robert W. Price, Sr.; Ted W. Price, Sr.; Robert W. Price, Jr.; Ted W. Price, Jr.; SASA Limited Partnership; Allen Market Lane Apartments Associates, a Missouri Limited Partnership; Blair School Apartment Associates; Hamilton Development Associates; Lindell Plaza Redevelopment Corporation; Minerva Place Apartments Associates, a Limited Partnership; O'Fallon Place Limited Partnership; O'Fallon Place Limited Partnership, Phase II; O'Fallon Place Limited Partnership, Phase III; Revive 103 Associates; West End Apartments Associates; Madison Village, Ltd.; Arthur P. Gorman and Robert H. Gardner; Vicksburg Village Limited; Ashley House

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Associates; Hyatt Manor Limited; Valley Hi Associates; Algood Manor, Ltd.; Kanis Properties, Ltd.; Asheboro Properties Ltd.; Athens Properties Ltd.; Bon Air Associates; Bridge Creek Properties Ltd.; Brooksfield Properties Ltd.; Calhoun Properties Ltd.; Cartersville Properties Ltd.; Lakeview Properties Ltd.; Columbia Properties Ltd.; Cumberland Properties Ltd.; Dunlap Properties Ltd.; Eastman Properties Ltd.; Fayetteville Properties Ltd.; Forest Creek Properties Ltd.; Forsythe Properties Ltd.; Greenwood Properties Ltd.; LaFollette Properties Ltd.; Loudon Properties Ltd.; Macon Properties Ltd.; Manning Properties Ltd.; Mauldin Properties Ltd.; Fitzgerald Housing Assoc. Ltd.; North Augusta Properties Ltd.; Park Lake Properties Ltd.; Pebblebrook Properties Ltd.; Pendleton Properties Ltd.; Pickens Properties Ltd.; Raleigh Properties Ltd.;

Richmond Properties Ltd.; Riverside Properties Ltd.; Idlewild Properties, Ltd.; Seneca Properties Ltd.; Sneedville Properties Ltd.; Thomaston Properties Ltd.; Waynesboro Properties Ltd.; Winston Properties Ltd.; Azalea Woods Ltd.; Marshall Arms Associates Limited; Virgil Eisenbiez; Lynn Oak Court Company; Cimarron Group, Inc.; Eastbrook, Limited; Payne-Lincoln Properties; Fox Ridge Cooperative Townhouses, Inc.; Cody Plaza, a Kansas Limited Partnership; Sullivan Hall Housing Partnership, a Missouri Limited Partnership; Friendship Manor Housing Partnership, a Missouri Limited Partnership; Massey Park Housing Partnership, a Missouri Limited Partnership; Northlawn Gardens Limited Dividend Housing Association, a Michigan Limited Partnership; Alabama Baptist Retirement Center d/b/a/ Clara Verner Towers Apartments; Lakeview Apartments,

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Ltd.; Logan Apartments, Ltd.; Knights Manor, Incorporated; Leslie E. Salone d/b/a Universal Management; CMD Associates, Michigan Co-Partnership d/b/a JG Properties; Veard - Ottawa, Ltd.; Veard - Gassaway, Ltd.; Homes - Cases, Inc.; Waterside Estates, Lakeview Estates, Ltd; Terrill Commons, Ltd.; Veard - Parsons, Ltd; River Hill Limited; Terraced Park Limited; Princeton Park Apartments, Limited; Barron Builders and Management Company; Taven Apartments, a Limited Partnership; Columbia Apartments; Garden City Apartments Limited; Centrex North Redevelopment Corp.; Paul Tipps Enterprises #1; Holden House Associates, an Ohio Ltd. Partnership; Urban properties No. 2, a/k/a Holt Manor; Fairwood Manor Development Company; East Mall Associates; CASCO Associates; Urban Properties #1; Paul Tipps Enterprises #2; Carpenter's Associates; Paul Tipps

Enterprises #4; Belton Garden Associates; Blacherne Associates; Anthony Arms Associates; Academy Associates; Federal American Properties; Liberty Park Development Company; Logan Hill Associates; Meadow Village, Ltd.; Parkview Place Company; Penn Circle Tower Development Company; Jasper Housing Development Company; Savoy-Hoosier Associates; Southern Oaks Apartments, Inc.; Baytown Urban Development, Ltd.; Weyerbacher Terrace Associates; Henry Fredricks; Cane Gardens Ltd. Partnership; Princeton Park Ltd; River Hill Ltd.; Country Meadows Apartments; Terrace Park, Ltd.; F.L. Richards; Sanders Heights Apts., an Oklahoma Limited Partnership; Village DuLac, Inc.; National Church Residences of Buffalo, N.Y.; National Church Residences of Baltimore; National Church Residences of Middletown; National Church Residences of Gahanna; National

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Church Residences of Sharpsburg, Pennsylvania, Inc.; National Church Residences of Ceredo, West Virginia, Inc.; National Church Residences of Bristol Village; West Virginia Homes Inc.; George Maharg; Jaycom Charitable Trust; Robert Pesa; Peterson Apartments, a Michigan Partnership; Branchwood Associates of Hardeeville; Baytree Associates of Ridgeland; Cambridge Association of Lamar; Spruce Pines Associates of Landrum; Tall Pines Associates of Loris; Walterboro Village Associates; Willow Oaks Associates of Cowpens; Amberly Apartments Associates; Eastpointe Apartments Associates; Ashwood Apartments Associates; Southfield Townhouses Associates; Kettering Square Apartments Associates; Woodview Manor Associates; Southmoor Associates; Lincoln Hills Development Corporation; Joseph Herzig and Barbara Herzig; Barton House

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LDHA; Elizabeth Arms Limited Partnership; Broad River Limited Partnership; Parkwood South Limited Partnership; Bethlehem Village Limited Partnership; Profit Hills Limited Partnership; Whitney Young Terrace Limited Partnership; National Church Residences of Chillicothe, Ohio; and Roth-Helfman Associates, Ltd, a Michigan Limited Partnership